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SUPREME COURT OF THE UNITED STATES.

No. 203.

THE CITY FIRE INSURANCE COMPANY OF HARTFORD, PLAINTIFF IN ERROR,

vs.

WILLIAM LONGHURST.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF IOWA.

GOVERNMENT PRINTING OFFICE

333

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1 District court of United States for dist. of Iowa, northern division.—October term, 1860.

TUESDAY, *October* 16*th*, 1860.

WILLIAM LONGHURST
vs.
THE CITY FIRE INSURANCE COMPANY OF HARTFORD, CT.

In the above-entitled cause, it being shown to the court that on application of defendants the above cause had been duly moved from the city court of the city of Dubuque, State of Iowa, and that a copy of the original process in said cause was this day filed in the court, upon application of defendant's counsel, Wilson, Utley & Doud, and Samuels, Allison & Crane, move in open court, it is now ordered that said cause be docketed among the law causes of the court, and that plaintiff be required to give security for costs.

2 October term, 1860.

FRIDAY, *November* 20*th*.

WILLIAM LONGHURST
vs.
THE CITY FIRE INSURANCE COMPANY OF HARTFORD, CT.

This cause comes on to be heard on the plaintiff's demurrer to defendant's answer; and upon consideration of the same the court ordered that the demurrer to defendant's be answer be sustained, and that defendant have leave to amend his answer. Cause continued at defendant's costs.

April term, 1861.

THURSDAY, *May* 9*th*, 1861.

Court met pursuant to agreement; present, same officers.

WILLIAM LONGHURST
vs.
THE CITY FIRE INSURANCE COMPANY OF HARTFORD, CONNECTICUT.

And now, this 9th day of May, 1861, this cause comes on for trial, the plaintiff appearing by Bissel, Mills & Shirus, his *his* attorneys, and the defendant by Wilson, Utley & Doud, and Samuels, Allison & Crane, its attorneys; and as a jury being demanded to try the issue, thereupon came a jury, to *to* wit: Richard Cambell, John

O'Laughlin, J. B. Thomas, Silas Moore, Allen Wickley, Ed-
3 ward Spotswood, Horace Emery, Theophilus Crawford, Charles W. Arther, A. B. Harrison, George W. Clark, William S. Winter, twelve good and lawful men, all citizens of the district of Iowa and northern division thereof, who, being duly empaneled and sworn, and after hearing the evidence, the arguments of counsel, and the charge of the court, retired to consider upon a verdict, and afterwards returned into court with the following verdict: We, the jury, find a verdict for plaintiff, and assess the damages at three thousand sixty $\frac{47}{100}$ dolls.

Thereupon came the defendant and files its motion to set aside the verdict, and for new trial, upon consideration of which the court overruled the motion.

It is thereupon ordered, considered, and adjudged by the court, that the said plaintiff, William Longhurst, have and recover of and from the said defendant, the City Fire Insurance Company of Hartford, Connecticut, judgment for the said sum of three thousand sixty $\frac{47}{100}$ dolls. and costs of suit, taxed at ——, with interest at 6 per annum.

4 *Bond.*

District court of the United States for the northern division of the State of Iowa.

WILLIAM LONGHURST
vs.
THE CITY FIRE INSURANCE CO. OF HARTFORD.

Know all men by these presents that the City Fire Insurance Company of Hartford, as principal, and Henry T. Utly, John Doud, jr., D. S. Wilson, and M. D. Bissell, of the city of Dubuque and State of Iowa, as sureties, are held and firmly bound with the above marked William Longhurst, in the sum of one thousand dollars, to be paid to the said William Longhurst, his executors, or administrator. To which payment well and truely be made, we bind ourselves, and each of us, jointly and severly, and each of our successors, heirs, executors, and administrators, firmly by *by* these presents. Sealed with our seals, and dated October thirty-first, in the year of our Lord one thousand eight hundred and sixty-one.

Whereas the above named, the City Fire Insurance Company of Hartford, hath prosecuted a writ of error to the Supreme Court of the United States to reverse the judgment rendered in the above writ, by the district court, for the northern division of the State of Iowa.

Now, therefore, the condition of this obligation is such, that if the above named, the City Fire Insurance Company of
5 Hartford, shall prosecute its suit and writ of error to effect and

answer all costs, if it shall fail to make good its plea, then this obligation shall be void; otherwise, the same shall be and remain in full force and virtue.

THE CITY FIRE INSURANCE COMPANY
OF HARTFORD.
By WILSON, UTLEY, and DOUD,
Its Attorneys.

HENRY T. UTLY.
JOHN DOUD, JR.
D. S. WILSON.
M. D. BISSELL.

Approved,

J. M. LOVE, *Judge, U. S. Court.*

Filed Oct. 31st, 1861.

J. C. BURNS, *Cl'k.*

6 *Citation.*

UNITED STATES OF AMERICA, *ss:*

To William Longhurst, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington, on the first Monday in December next, pursuant to a writ of error, filed in the clerk's office of the district court of the United States for the district of Iowa, wherein the City Fire Ins. Company of Hartford is plaintiff and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected, and speedy justice should not be done to the parties in that behalf.

Witness the honorable J. M. Love, judge of the district court of the United States for the district of Iowa, this thirty-first day of October, in the year of our Lord one thousand eight hundred and sixty-one.

J. M. LOVE,
Judge of U. S. Court, District of Iowa.

Filed Oct. 31st, 1861.

J. C. BURNS, *Cl'k.*

Writ of Error.

7 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the judge of the district court of the United States for the district of Iowa, greeting:

Because in the record and proceedings, as also in the rendition of a judgment in a plea, which is in the said district court for the northern division of said State of Iowa before you, between William Longhurst and the City Fire Insurance Company of Hartford, a manifest error hath happened to the great damage of the said, the City Fire Insurance Company, as by its complaint appears. And it being fit

that the error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, you hereby commanded, if judgment be therein given, that then, under your seal distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second day of December next, in the said Supreme Court to be there and then held; that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the law and custom of the United States should be done.

Witness the honorable Rodger B. Taney, chief justice of the
8 said Supreme Court of the United States, this fourteenth day of March, in the year of our Lord one thousand eight hundred and sixty-one, and of the independence of the United States the eighty-fifth.

Allowed by

J. M. LOVE,
Judge of U. S. Court.

Filed Oct. 31st, 1861.

J. C. BURNS, *Clk.*

9 *Bill of Exceptions.*

United States court, northern division of Iowa.

WILLIAM LONGHURST
vs.
THE CITY FIRE INSURANCE COMPANY OF HARTFORD.

Afterwards, to wit, at the day and place within contained, before the honorable J. M. Love, district judge of the United States in and for the State of Iowa, came as well the said William Longhurst, by Bissel, Mills and Shrius, his counsel, as the said The City Fire Insurance Company of Hartford, defendant, by Wilson, Utley and Doud, its counsel, and the jurors of the jury, whereof mention is within made, being called, likewise came, and after being elected, tried, and sworn to try the several issues within joined, the counsel for the said plaintiff gave in evidence on his behalf to the said jury the following, to wit:

The said counsel for the plaintiff there offered in evidence to the court and jury the policy of insurance, of which a copy is set forth and contained in the declaration in this action.

And thereupon the said counsel for the plaintiff did offer as a witness William Longhurst, who, being duly sworn, did testify as follows:

I am acquainted with the premises described in the policy.
10 The building was destroyed by fire on the night of the 23d o January, A. D. 1858.

On his cross-examination the said witness further testified:

"I have no doubt the building was set on fire." The fire caught in the third story of the building.

On his direct examination resumed the said witness further testified: "On the day after the fire occurred, I told Mr. Bates of the fire. Bates was the agent of this company at this place. That notice was verbal."

The said counsel for the plaintiff then and there offered in evidence the written statement and proof of loss, furnished by the said plaintiff to the said company, and produced by the said company under notice of plaintiff's counsel.

This written statement and alleged proof of loss was objected to by said counsel for defendant, on the ground that the same is insufficient. 2d, it is not such proof as is required by the said policy to be made.

The objection was overruled by the court, to which ruling of the court the said counsel for the defendant then and there excepted.

The said statement and alleged proof of loss was then and there read in evidence, of which said statement the following is a copy, to wit:

11 STATE OF IOWA,
Dubuque county, ss:

Statement of William Longhurst in relation to his interest in the building known as the St. Cloud hotel, or Lawrence block, in the city of Dubuque, county of Dubuque and State of Iowa.

The interest of said William Longhurst in Lawrence block, or St. Cloud hotel, situated on the east side of Main street between ninth and tenth streets, in the city of Dubuque, consists in a claim in his favor for the full and just sum of eighteen thousand and twenty-six $\frac{13}{100}$ dollars, which said sum is due him from Edward C. David, the owner and builder of Lawrence block, for which sum the said Longhurst holds a mechanic's lien upon the said premises.

The said lien upon the said Lawrence block being the interest insured by Wm. Longhurst.

The schedule marked A, hereto annexed, is referred for a more full statement of the items of the claims above referred to.

The Lawrence block was built as a hotel, but was unocupied, with the exception of one store on the first floor, which was used by one John Hancock, as a shoe store, and a portion of the basement, occupied as a academy for dancing, by one Joseph Thompson.

The cause or origin of the said fire is unknown to the said William Longhurst.

The interest of the said Wm. Longhurst in the Lawrence block was insured in the sum of eighteen thousand dollars in
12 the following companies, to wit: Hampden Fire Insurance Company of Springfield, Mass., $1,500; Conway of Conway, Mass., $1,500; Phœnix, Hartford, Conn., $5,000; Star of Ogdenburgh, N. Y., $2,000; City Hartford, Conn., $300; City of New Haven, $5,000.

The Lawrence block was built by Edward C. David upon property

leased for the term of twenty years. He had an insurance for the sum of sixty thousand dollars, as affiant is informed, upon building in addition to that taken by Longhurst.

WILLIAM LONGHURST.

STATE OF IOWA,
Dubuque county, ss:

William Longhurst, being duly sworn, deposes and says, that he has read the foregoing statement signed by him, together with the schedule, bills, copies of policys, &c., and that the matter and things therein set forth are true, as he verily believes.

WILLIAM LONGHURST.

Subscribed and sworn to before me this 29th day of January, A. D. 1858. Witness my hand and notarial seal.

[L. S.] CHAS. H. PERRIGO,
Notary Public.

CITY FIRE INSURANCE COMPANY OF HARTFORD, CONN., $3,000.

No. 38. By this policy of insurance, the City Insurance Company of Hartford, in consideration of fifty-five dollars to them in hand paid by the assured, hereinafter named, the receipt whereof is
13 hereby acknowledged, do insure William Longhurst against loss or damage by fire to the amount of three thousand dollars on the five story brick building, and three story brick building known as Lawrence block, occupied for stores below, the upper portion to remain unoccupied during the continuance of this policy, situated on the east side of Main street, between 9th and 10th streets, Dubuque, Iowa.

It is the intention of this policy to cover a mechanic's lien on said building, insured on said lien, as follows: 2,000 in Star Insurance Company, N. Y.; 3,000 in Dubuque Union Company, Dubuque; 5,000 in Home Company, of New York; and five thousand in other companies.

Conway Fire Insurance Company, of Conway, Mass., $1,500.

No. 3. By this policy of insurance the Conway Fire Insurance Company, of Conway, in consideration of thirty dollars by them paid by the assured hereinafter named, the receipt whereof is hereby acknowledged, do insure William Longhurst against loss or damage by fire to the amount of fifteen hundred dollars on the five-story brick building and the three-story addition, known as the Lawrence block, and occupied for stores below; the upper portion to remain
14 unoccupied during the continuance of this policy, and situated on the east side of Main street, between 9th and 10th streets, Dubuque, Iowa.

Reference had to survey No. 3, on file in the office of Conway Fire Insurance Company.

This policy of insurance is to cover to the amount of the policy a mechanic's lien on the above described building; $76,500 other insurances as follows: $60,000 by owner and $16,500 by assured.

THE STAR INSURANCE COMPANY OF OGDENSBURGH, N Y.

By this stock policy of insurance, in consideration of one hundred dollars to them paid by the assured hereinafter named, the receipt whereof is hereby acknowedged, do insure William Longhurst, (mortgagee,) Dubuque, Iowa, against loss or damage by fire to the amount of five thousand dollars, as follows: On the five-storried brick building and the three-storied back building, known as Lawrence block, occupied for stores below; the upper portion to remain unoccupied during the continuance of this policy, and situated on the east side of Main street, between 9th and 10th streets, Dubuque, Iowa.

Further reference is hereby made to survey No. 62, which is hereby made part of this policy, on file in the office of the Star
15 Insurance Company, of Ogdensburgh, New York; $63,000 additional insurance.

Endorsed: Three thousand dollars of the within amount insured is hereby canceled from this date, and return premium of fifty-five dollars for the unexpired term of eleven months, refunded receipt of which is hereby acknowledged. Dubuque, November 19th, 1857. William Longhurst.

PHŒNIX INSURANCE COMPANY OF THE CITY OF HARTFORD.

By this policy of insurance, the Phœnix Insurance Company, in consideration of one hundred dollars to them in hand paid by the assured hereinafter named, the receipt whereof is hereby acknowledged, do insure William Longhurst, (mortgagee,) of Dubuque, Iowa, against loss by fire to the amount of five thousand dollars on the five-story brick building and the three-story back building, known as Lawrence block, occupied below for stores; the upper portion to remain unoccupied during the continuance of this policy, and situated on the east side of Main street, between 9th and 10th streets, Dubuque, Iowa. Further reference is hereby made to survey No. 226, which is hereby made part of this policy, on file in the office of the Phœnix Insurance Company of the City of Hartford, Con.; $63,000 additional insurance.

THE CITY FIRE INSURANCE COMPANY OF NEW HAVEN, CONN.

16 In consideration of one hundred dollars to them in hand paid by the assured hereinafter named, the receipt whereof is hereby acknowledged, do insure William Longhurst, (mortgagee,) Dubuque, Iowa, against loss or damage by fire to the amount of five thousand dollars on the five-story brick building and the three-story brick additional, known as the Lawrence block, occupied for stores below; the upper portion to remain unoccupied during the continuance of this policy, and situated on the east side of Main street, between 9th and 10th streets, Dubuque, Iowa.

Further reference had to application and survey No. 13, on file in this office, and which is hereby made part of this policy; $63,000 additional insrance in other companies.

HAMPDEN FIRE INSURANCE COMPANY, SPRINGFIELD, MASS.

No. 3. By this policy of insurance, the Hampden Fire Insurance Company, in consideration of thirty dollars to them paid by the assured, hereinafter named, the receipt whereof is hereby acknowledged, do insure William Longhurst against loss or damage by fire to the amount of fifteen hundred dollars on the five-story brick building and the three-story brick additional, known as the Lawrence block, occupied as stores below; the upper portion to remain un-
17 occupied during the continuance of this policy, and situated on the east side of Main street, between 9th and 10th streets, Dubuque, Iowa. Further reference had to survey No. 3, in this office.

This policy of insurance is to cover to the amount of the policy a mechanic's lien on the above-described building; $76,500 additional insurance in other companies, as follows, to wit: $60,000 by owner and $16,500 by assured.

Mr. E. C. David

To William Longhurst, DR.

1856, Dec. 20th.—For making additional rooms in four upper stories, as per amount agreed upon, including stairs in south end, complete, except plastering..... $5,940 00

2.

Mr. E. C. David

To William Longhurst, DR.

1857, April 18th.—For contract for addition to Lawrence block, all joiner's work, painting, and glazing..... $2,650 00

3.

Mr. E. C. David

To William Longhurst, DR.

1857, April 21.—To contract for fitting up store No. 3 .... $800 00
" " " store No. 2 .... 325 00

4.

Mr. E. C. David

To William Longhurst, DR.

1857, August 30.—For day work and extra work,
18 and furnishing materials for the Lawrence block, as per agreement, in addition to the original contract..... $2,729 15

5.

Mr. E. C. David

To William Longhurst, DR.

To amount due Longhurst on the original contract between David and Berry, Playter and Longhurst..... $5,581 96

The certificate of the notary as to loss required by policy is found on page herein should have been inserted here.

And the said counsel for the plaintiff did further offer the second statement and proof of loss made by the said William Longhurst, which said statement was objected to by the said counsel for the defendant, on the ground, 1st, that it is insufficient; 2nd, it is not such statement as is required to be made; 3rd, it is not proved to have been served; 4th, it was not made within the time required by the policy, and cannot be taken as proof of what is alleged therein; 5th, the same is immaterial.

The objection made as aforesaid was overruled by the court, and the statement received in evidence. To which ruling of the court the said counsel for the defendant did there and then except.

The said statement, so read in evidence, is as follows:

19 STATE OF IOWA,
Dubuque County, ss:

William Longhurst, being duly sworn, deposes and says:

That his interest in the Lawrence block, or St. Cloud hotel, in the city of Dubuque, State of Iowa, consists of a mechanic's lien upon the said building.

That he is entitled to said lien by virtue of having furnished materials and performed work and labor in the erection of the building aforesaid, in pursuance of a contract made and entered into with Edward C. David, the owner and builder of the said building.

That the greater portion of the materials were furnished and labor done, in accordance with the terms of a written contract with Edward C. David, which said contract was made by William Longhurst, of the firm of Berry, Playter and Longhurst, of the one part, and E. C. David, of the other part.

That Berry, Playter and Longhurst agreed and bound themselves to furnish the materials and erect the buildings, in accordance with the specifications in said contract, and in consideration thereof E. C. David was to pay the sum of $\$70,427\frac{50}{100}$.

That Berry and Playter were to do the mason work, and William Longhurst the carpenter and joiner work, and painting and glazing, and were to receive therefor at the rate the work they re-
20 spectively performed was charged in the specifications.

That there is now due on said contract, to the said Berry, Playter & Longhurst, the sum of $8,382; the balance unpaid out of the original contract, of which there is due to William Longhurst the sum of $\$4,681\frac{16}{100}$.

That the only copy of said written contract know to be in existence is in the possession of Edward C. David; wherefore affiant cannot annex a copy of the same hereto.

That the balance of the materials and the work and labor done, in pursuance of certain special verbal contracts, whereby it was agreed and covenanted by and between William Longhurst, Edward C. David, that if Longhurst would furnish the materials and perform the

work and labor necessary to build an addition to the St. Cloud hotel, or Lawrence block, that is, so far as the joiner's work was concerned, and also to fit up and finish certain of the store-rooms in said building, and also to make certain alterations in the said building, then E. C. David agreed and promised to pay therefor as follows, to wit:

So far as the store was concerned and building the addition he was to pay certain and specified sums, amounting in all to the sum of $9,715, and for the alterations was to pay whatever the same was reasonably worth.

21 That affiant performed fully and in good faith his share of the said contracts, and that there is now justly due him thereon the full sum of $17,125 33/100.

That when affiant insured his interest in the building, he supposed and verily believed his interest to amount to the full and just sum of $18,026, but within a few days past and since the fire, upon a comparison of books and papers with Edward C. David, it was found that several payments had been made for which no credit had been given, amounting to the sum of $901 33/100, so that the amount really and justly due him from E. C. David is the sum of $17,123 33/100, with interest, which constitutes the interest of affiant in the said building, and which is covered by the insurance.

That affiant has filed the notice required by the laws of Iowa to entitle him to a lien upon said premises, and is now filing the papers necessary to maintain an action at law for the same.

That affiant expects to obtain judgement against the said property at the May term of the district court of Dubuque county, Iowa.

That affiant is not informed as to whether E. C. David will dispute or resist said claim or not.

That he, the said David, has neither admitted or denied the correctness of affiant's claim.

22 That Berry and Plater, and A. G. Bole, claim mechanic's liens upon the same premises for the aggregate sum of $12,500.

That the said liens are now even as regards priority. That whichever party obtains the first judgment will hold the first lien.

That said building cost about the sum of —— and was a new building. That the cash value of affiant's lien, at the time of said fire, was $17,125 33/100.

That the value of the property yet remaining covered by affiant's lien is uncertain, and affiant cannot now state what the same is, but affiant states that the same could not now be sold for more than a nominal sum.

That affiant does not believe that the said E. C. David is able to pay the mechanic's lien upon said building.

That if the amount insured by *by* David on said building is applied to the payment of the mechanic's lien, it would more than pay up the same.

That this insurance has been assigned by David to his father and brother to secure, as he alleges, money due from him to them.

That he does not think the risk has been increased since the in-

surance was taken upon it. That, as affiant is informed, E. C. David had an insurance amounting to sixty thousand dollars on said premises.

Berry and Playter, an insurance upon the mechanic's lien to the amount of two thousand dollars, and affiant has an insurance
23 to the amount of eighteen thousand dollars.

WILLIAM LONGHURST.

Subscribed and sworn to before me this 1st day of March, 1858. Witness my hand and notarial seal.

[L. S.] CHAS. H. PERRIGO, *Notary Public.*

The foregoing proof in writing was served on the company about the date of same, and was produced by defendant on trial under notice from the plaintiff.

And the said counsel for the plaintiff did further offer in evidence the record of a judgment rendered in the district court of Dubuque county, in which William Longhurst is plaintiff and Edward C. David defendant, for the purpose of showing the establishment of plaintiff's mechanic's lien.

This judgment and record thereof was objected to by the said defendant's counsel, on the ground that the same does not show any mechanic's lien or the establishment thereof in the plaintiff, prior to the 13th day of July, A. D. 1857, which objection was overruled by the court, and the judgment and record were given in evidence; to which ruling and evidence the said counsel for the defendant then and there excepted.

The following is the record and *and* judgment so offered and given in evidence as aforesaid:

24 District court Dubuque county.

WILLIAM LONGHURST *vs.* EDWARD C. DAVID. } Petition.

This cause coming on for hearing, and parties appearing and demanding a jury, the following persons were chosen, selected, impanneled and sworn as a jury to try the issue, to wit: J. H. Bartlett, P. M. Goldwik, J. Woodword, John O'Lauglan, Thomas McCann, John O'Mera, R. Notte, James Umphry, Jno. Cantag, Robert Stewart, S. Hildebrand, D. Monarty. After which the court adjourned till nine o'clock Monday morning.

MONDAY, *June* 13, 1859.

This cause coming on for hearing, the evidence and arguments of counsel were presented to the jury, and after receiving the charge of the court, they retired to consider of their verdict.

The court then adjourned till nine o'clock to-morrow morning.

TUESDAY, *June* 14*th*, 1859.

The jury impanneled in this case this morning came into court with the following verdict:

We, the jury, find for the plaintiff, and assess the damages at $13,750 $\frac{25}{100}$, to which defendant excepts and files motion for a new trial.

TUESDAY, *July* 12*th*, 1859.

25 This cause coming on for hearing and motion for a new trial, it is considered that said motion be overruled, and that plaintiff have and recover of defendant judgment for thirteen thousand seven hundred and fifty and $\frac{25}{100}$ dollars, ($13,750 $\frac{25}{100}$) and costs of suit, taxed at forty $\frac{15}{100}$ dollars, and that he have execution therefor.

And said cause coming on for hearing as to plaintiff's mechanic's lien for am't of judgment rendered, it is considered and adjudged by the court that said judgment be a mechanic's lien upon the property described in the petition, to wit: lots 33, 34, 35, and 36, together with appurtenances thereunto belonging, situated on Main street, in the city of Dubuque, Iowa, and that special execution issue therefor.

And the said counsel for plaintiff did further offer in evidence the record of judgment in the district court of Dubuque county, in which Berry, Playter & Longhurst are plaintiffs, and Edward C. David is defendant, for the purpose of proving the establishment of mechanic's lien.

This record of judgment was objected to by the said defendant's counsel, on the ground that the same does not show any mechanic's lien, or the establishment thereof, in the plaintiff. 2d. It does not show any lien, or the establishment thereof, prior to the 12th day of July, 1859; which said objection was overruled by the court and the record of judgment was given in evidence; to which said ruling
26 and the evidence the said counsel for the defendant did then and there except.

The following is said record of judgment:

District court, Dubuque county, Thursday, June 9, 1859.

BERRY, PLAYTER & LONGHURST, *vs.* EDWARD C. DAVID. } Petition.

This cause coming on for a hearing, and parties appearing by attorneys and demanding a jury, the following persons were drawn, selected, and impanneled, and sworn as a jury to try the issue, to wit:

Jno. Cantag, Thomas McCann, Jno. O'Lauglan, P. McGoldwick, J. Woodward, R. Nottee, James Murphy, J. H. Carpenter, Jno. O'Meara, A. Fayes, Robert Stewart, and J. Wolgran.

And after hearing a portion of the evidence, the further consideration of the case was postponed till nine o'clock to-morrow morning.

FRIDAY, *June* 10*th*, 1859.

This cause again coming on for hearing, the evidence was fully presented to the jury, and after hearing the evidence and arguments of counsel and receiving the charge of the court, they retired to consider of their verdict, and after being out a short time, returned into the court with the following verdict:

We, the jury, find for the plaintiff and assess the damages at $6,139\frac{76}{100}$.

27 It is, therefore, considered and adjudged by the court, that the plaintiff have and recover of defendants judgment for said sum of six thousand one hundred and thirty-nine dollars and seventy-nine cents, and costs of suit taxed at twenty-eight $\frac{36}{100}$, and that execution issue therefor.

TUESDAY, *July* 12*th*, 1859.

This cause coming on for hearing as to mechanic's lien of plaintiffs for amount of judgment heretofore rendered, it is considered and adjudged by *by* the court, that said judgment be a mechanic's lien on the property described in the petition, to wit: Lots 33, 34, 35, and 36, together with appurtenances thereto belonging, situated on Main street, in the city of Dubuque, Iowa, and that special execution issue therefor.

The following affidavit was also read in evidence:

STATE OF IOWA,
Dubuque County, ss:

William Longhurst, being duly sworn, deposes and says:

That he is one of the firm of Berry and Plater & Longhurst, plaintiffs in the above-named case. That by the arrangement between said partners the contract for building the Lawrence block, made at the time of entering upon said contract, he is entitled to the sum of $3,043\frac{10}{100}$ from the amount due plaintiffs from E. C. David. That this deponent's share of the judgment rendered in behalf of

28 plaintiffs against defendant amounts to the sum of $3,043\frac{10}{100}$.

That this deponent's whole interest, by way of mechanic's lien upon the Lawrence block, amounts to the full sum of $16,793\frac{36}{100}$, to wit: his share in the judgment in the case of Berry, Playter & Longhurst, $3,043\frac{10}{100}$, and the judgment in the case of William Longhurst *vs.* E. C. David, $13,750 26; all of which is due and unpaid.

WILLIAM LONGHURST.

Subscribed and sworn to before me this 20th day of August, 1859, as witness my hand and notarial seal.

[L. S.] CHAS. H. PERRIGO,
Notary Public.

And the said counsel for the plaintiff did further offer in evidence the *the* petition in each of the actions in which judgment, as herein stated, was rendered; that each of said petitions claimed an amount

for which judgment was rendered; each prayed for a mechanic's lien on the lots described in said judgment.

The said petitioners claimed that the work was commenced on said building in April, 1856, and was completed September, 1857, which is the same property on which the said Lawrence block or St. Cloud hotel was situated; which evidence was objected to by the said counsel for defendant on the ground that the same is incompetent and immaterial.

The objection was overruled by the court, and the said petitions admitted in evidence; to which ruling of the court the said
29 counsel for the defendant did then and there except.

And thereupon the said counsel for the plaintiff recalled William Longhurst as a witness, who testified as follows:

The Lawrence block was on Main street between 9th and 10th streets. The work on the building was completed in the month of September, 1857, and before these insurances were effected. That building was new, and cost about 103,000.

On his cross-examination the said witness further testified: The building was situated on lease ground. I only state what the building cost. I could not tell what the building would have sold for, being on lease ground. It was worth the amount of the mechanic's lien.

And the said counsel for the plaintiff did further offer as a witness Henry Littleton, who, being duly sworn, testified as follows:

As I remember the matter, Mr. Longhurst applied to me for $18,000 insurance. I am insurance agent in this city, and have been such agent five or six years. I took as much as I wished the companies I was agent for to take, and procured Mr. Bates to take the insurance in this case.

I stated to Mr. Bates it was his interest, by virtue of a mechanic's lien on the St. Cloud hotel, that Mr. Longhurst wanted insured.

I have no recollection saying to Mr. Bates that there was a joint interest in the lien wanted to be insured.

30 I know the St. Cloud hotel. I thought at that time the building was worth $100,000.

There was $50,000 insured on the building by the owner when the insurance in this case was effected.

On his cross-examination the said witness further testified: "I would have given the amount of the mechanic's lien for the building, under the circumstances, at the time of the loss."

And the said counsel for the plaintiff did further offer as a witness O. P. Shirus, who, being duly sworn, testified as follows:

"I don't know whether I served these assignments of judgments on Bates or Bissel & Co. I served them on one of them, and did so some time in the summer of 1859."

On his cross-examination the witness further testified: "It may have been as late as August, 1859. It is possible I may have sent the papers to Horatio Day, at Hartford, to serve on the company."

On his direct examination resumed, the said witness further testified: I served this original. I think I took it to Bissel & Co. in De-

cember, 1859. I retained a copy of them all, but cannot find the copy of this.

The memorandum on the back of this paper was not on it when I served it.

And the said counsel for the plaintiff did then offer in evidence an assignment of judgments, being the same paper testified to by the witness, O. P. Shirus; which alleged assignment was objected
31 to by the said counsel for the defendant on the ground that it is immaterial; 2d, it is incompetent. The objection was overruled by the court, and the paper read in evidence, to which ruling of the court and said evidence the said counsel for the defendant did then and there except.

The following is the paper thus offered and admitted to be read in evidence as aforesaid:

Know all men by these presents, that I, William Longhurst, of Dubuque county, Iowa, for value received, to me paid by the City Fire Insurance Company of Hartford, Connecticut, do hereby sell, assign, and transfer to the said City Fire Insurance Company one-twelfth part of a certain judgment rendered in my favor at the May term, 1859, of the district court of Dubuque county, Iowa, against E. C. David, for the full and just sum of thirteen thousand seven hundred and fifty $\frac{26}{100}$ dollars, and costs, taxed at forty $\frac{15}{100}$ dollars, the said judgment being declared to a mechanic's lien upon lots No. 33, 34, 35, and 36, in the city of Dubuque, Iowa.

It being the intent in the above assignment to sell, assign, and transfer to the said City Fire Insurance Company their share of *of* said judgment in proportion to the amount of the insurance in said company upon said Longhurst's interest in the Lawrence block, situated upon the premises above described; the balance of said judgment being assigned as follows, to wit:
32 Five-eighteenths ($\frac{5}{18}$) to the Phœnix Insurance Company of Hartford; one-sixth ($\frac{1}{6}$) to the City Fire Insurance Company of New Haven; one-ninth ($\frac{1}{9}$) to the Star Insurance Company; one-twelfth ($\frac{1}{12}$) to the Hampden Fire Insurance Company; one-twelfth ($\frac{1}{12}$) to the Conway Fire Insurance Company; the same being their pro-rata share of said judgment in proportion to the amount of insurance by them insured upon the interest of the said Longhurst in said Phœnix hereinbefore described.

WILLIAM LONGHURST.

Know all men by these presents, that I, William Longhurst, of Dubuque county, Iowa, for value received, to me in hand paid by the City Fire Insurance Company of Hartford, do hereby sell, assign, and transfer unto the said City Fire Insurance Company one-sixth ($\frac{1}{6}$) part of my share or interest in a certain judgment rendered in favor of Berry, Playter & Longhurst against Edward C. David, at the May term, 1859, of the district court in Dubuque county, Iowa, for the sum of six thousand one hundred and thirty-nine $\frac{79}{100}$ dollars, and costs, taxed at $28 25; the said judgment being declared to be a

mechanic's lien upon lots number 33, 34, 35, and 36, in the city o Dubuque, Iowa, my share in said judgment amounting to the sum (three thousand and forty-five $\frac{10}{100}$ dollars, it being the interest on th above assignment to sell, transfer, and assign to the said City Fi Insurance Company their share of said judgment in proportion to th amount of the insurance in said company upon the Lawrenc
33 block, situated upon the premises hereinbefore described, the balance of said judgment being assigned as follows, to wit: five-eighteenths ($\frac{5}{18}$) to the Phœnix Insurance Company; one-twelfth ($\frac{1}{12}$) to the City Fire Insurance Company of New Haven, Connecticut; one-ninth ($\frac{1}{9}$) to the Star Insurance Company; and one-twelfth to the Hampden Fire Insurance Company, and one-twelfth to the Conway Fire Insurance Company, these being the shares said company are entitled to in proportion to the amounts by them insured upon the interest of the said William Longhurst in said premises aforesaid.

WILLIAM LONGHURST.

The said paper was produced by def't's counsel, and the *the* said counsel for the plaintiff did recall William Longhurst as a witness, who testified as follows:

My interest amounted to $13,750 at the time the judgment was rendered. I could not state the amount when the loss occurred. This was my judgment; my interest in the judgment of Berry, Playter & Longhurst amounts to $3,045.

The said counsel for the plaintiff did then and there offer in evidence the correspondence between plaintiff's attorney and the defendant, which was objected to by the said counsel for the defendant on the ground that it is immaterial.

The court overruled the objection, and permitted the letter to be read in evidence.

34 The counsel for the defendant did then and there except to the said rulings of the court.

The following is the correspondence so offered and received in evidence as aforesaid.

DUBUQUE, IOWA, *March 20th*, 1858.

CITY FIRE INS. CO.

GENTS: In behalf of William Longhurst, who holds a policy of your company upon a mechanic's lien upon Lawrence block or St. Cloud hotel, which building was lately destroyed by fire, he would say:

That the affidavits furnished to your agent comprise as full a statement of Longhurst's interests, loss, &c., as we can at present make out.

He has commenced an action at law against E. C. David, the owner of the building, for the enforcement of his lien. The decision in this case will furnish satisfactory evidence of the amount of Longhurst's claim and his right to a lien.

As soon as the case is decided we will furnish you with the evidence of the result.

The case is set for the May term of court, but may not be reached before August.

We trust this unavoidable delay will not injure the rights of our client. We have as Longhurst's attorneys also commenced proceedings in chancery by injunction to hold the insurance taken by E. C. David, the owner of the premises, for the benefit of the mechanics who claim liens.

35 If we are successful in this, it will of course inure to your benefit. Owing to the peculiar nature of Longhurst's interest in the premises, *(i. e.,)* a mechanic's lien, we do not see that we can furnish any further evidence of his interest, until the termination of the suit above referred to, when we shall at once supply that which is wanting."

"Yours, &c.,
BISSEL, MILLS & SHIRNS,
Attorneys."

The following is the reply given in evidence:

CITY FIRE INSURANCE COMPANY,
Hartford, March 26, 1858.

Messrs. BISSELL, MILLS & SHIRNS, *Attorneys, &c., Dubuque:*

GENTS: We have yours of March 20th, and contents noticed. Should you not take such steps as will hold the remains of the property subject to the decision of the court as to the validity of the lien? We make this suggestion, not knowing but that you have already done so.

If the law gives Mr. Longhurst & Co. a lien on the building, it remains good on the materials left, and they should be sold and applied *pro rata* in discharge thereof, not only as an equity accruing in favor of lien and parties liable therefor as insurers, but our policies actually require it. See Sec. XV of the conditions of insurance.

36 The principle there expressed is by the language limited, yet in construction of law applies to all cases of collateral interests covered by insurance.

Decisions are, it is true, somewhat conflicting on this point, yet the preponderance of authority is much in favor of holding the original security good to the ultimate holders of the debt.

Yours, very truly,
H. D. CONDICT, *Pres'dt.*

The plaintiff here rested his action.

And thereupon the said counsel for the defendant did on its behalf call as witness Donald McKenzie, who being duly sworn, testified as follows:

"I reside in Dunleith; Dubuque is my place of business, and has been for six years. I was the agent of the defendant at Dubuque

from the 8th day of November, 1859, to the month of September, 1860.

Mr. Littleton was the agent for awhile preceding my appointment. Bissell & Co. are now the agents of the company at Dubuque.

They commenced in the month of September, 1860. I received the books of the company from Mr. Littleton's office, and when I ceased being the agent, I delivered them up to Bissell & Co."

And the said defendant by its counsel did further offer as a witness Edward C. David, who being duly sworn, testified as follows:

37 I reside in the city of Dubuque, and have so resided seven or eight years. I was the proprietor of the Lawrence block, the St. Cloud hotel.

I think the mechanics stopped work on the building about July, 1857.

There were nine departments in the Lawrence block, for stores, in the lower story. Conley and Hancock each occupied a store. Mr. Conley kept a dry-goods store, and Mr. Hancock kept a boot and shoe store. I don't recollect when Mr. Conley vacated his store. Mr. Thompson occupied the basement of the building for a dancing academy. I think he commenced occupying it before the 19th of November, 1857. I think he occupied it till it was burned. He had children in the afternoon, and grown persons in the evening. The basement was heated by stove fires. I think a printers' festival was on one occasion held in the basement. I left Dubuque in December, and did not return till after the fire. I had a lease of the grounds on which the Lawrence block was built, for twenty years."

(The original lease was then shown to the witness, who testified that it was the lease of the premises under which he held them.)

The witness further testified: "I don't hold the premises now. The ground rent was not all paid as it matured; there was none paid after the building was burned; there was rent due and unpaid at the time the building was destroyed; don't know when the payment of rent ceased."

38 (The said lease was given in evidence, and shows that it was executed to the said David on the ——— day of ———, to run for twenty years from date; that by its terms an annual rent of three thousand dollars was payable quarterly, and in case of non-payment of rent for a period of sixty days after it became due, subjected the lease to forfeiture.)

And the said defendant by its counsel did then offer to prove by the said witness, Edward C. David, that the said lease of said premises was concluded, determined, and ended, by the lessor of said premises, in the month of May, 1858, in pursuance of the provisions of said lease for rent that accrued before and after the loss of the building, and which remained unpaid. This offer was objected to by the plaintiff's counsel, on the ground that it is incompetent.

The court sustained the objection. The counsel for the defendant did then and there except to the said ruling of the court.

The witness, Edward C. David, then further testified:

"This contract shown me is the written contract under which the Lawrence block was built. Berry, Playter & Longhurst are parties of the one part, and myself party of the other part.

All the work done on the building was performed under this contract. The money was paid to Berry, Playter & Longhurst,
39 for the work done, and the receipts taken for it signed by Berry, Playter & Longhurst. These are the receipts of money for work done; the first one is dated June 1st, 1856, and the last one August 1st, 1857."

On his cross-examination the said witness further testified: The receipts are all marked, some W. L., and some B. & P. This was done so that they would know who the money was paid to. They wanted this done under an agreement among themselves, as they said they were not jointly interested in the work; but each got pay for his own work. This was not done so to all the receipts when given.

On his direct examination resumed: I never entered into a separate contract other than the written one. I believe every dollar I paid was under that contract. The stores were not completed by Nov., 1856. The first one was not ready till April, 1857. The building was not completed up to January, 1857. It was nearly finished in the summer of 1857. I think I paid 75 per cent. on all the work done on the building, and for materials furnished.

On his cross-examination the witness further testified:

Those receipts were all presented on the trials of the district court by Berry, Playter and Longhurst.

There was work done outside of the specifications. Work was added, and some thrown out. I got the fact of cost by separate estimates of brick work and carpenter work. I never paid them anything except what these receipts show.

40 And the said defendant, by its counsel, did further offer as a witness John S. Connelly, who, being duly sworn, testified as follows: I reside in the city of Dubuque; have so resided a little over four years. I am dry-goods merchant. I once occupied a store in the Lawrance block; I took possession on the 27th day of April, 1857, and moved our store from there on the 26th of December, 1857. We did not feel as safe there, for the risk was one reason for leaving; and another, it was too far up town.

The rent was reduced while we were there, from $2,000 to $1,000 per annum, in consequence of the bad condition of the store; the walls were damp. We did not entirely vacate the store; we left some goods in the store. We bought a lot of spirituous liquors, and in the first week in January, after we left, we stored them in that store. There was about $2,000 worth of liquors. They consisted of brandies, whiskey, &c. They remained there till the building was burned.

After we left the store, on the 26th of December, no one was left there in charge of it. We kept it locked up.

And the said defendant, by its counsel, did further offer as a wit-

ness Edwin H. Hancock, who, being duly sworn, testified as follows:

I reside in the city of Dubuque. I am in the boot and shoe business. I was in the St. Cloud or Lawrence block from the middle of November, 1857, up to the time it was burned. I occupied
41 one of the stores. Mr. Conley moved out of the store he occupied in that building in December. None other of the stores in that building were occupied except mine and Mr. Conley's. The basement room was occupied by Thompson, for dancing, up to the time of the fire. The dancing was in the daytime and evening.

On his cross-examination the witness further testified: "I think Thompson stopped some two weeks before the fire. I was at the fire. The fire broke out in the upper story, about the northwest part. I was to pay five hundred dollars rent per annum."

And the said defendant, by its counsel, did further offer as a witness Hiram Farquson, who, being duly sworn, testified as follows:

"I reside in Dubuque; have resided here upwards of four years. I am a printer. I recollect the burning of the St. Cloud. The basement of that building was occupied by one Thompson as a dancing academy. The printers held a festival there about one week
42 before the fire. One of the stores on the first story, and the basement, were occupied in holding the festival. The store was occupied for the supper; the cooking was done in the basement. One hundred couples of people were present. There was a drinking-room kept there; it was above the basement, and in a back room. Ardent spirits were drank there. The festival was held in the night time. Fires were kept in the rooms."

On his cross-examination the witness further testified: "The supper was had in the store, south of the main entrance. We paid no rent for room that I know of. We made arrangement with Thompson for the rooms."

And the said defendant, by its counsel, did further offer in evidence the original papers and proofs of service in this case in the State court, for the purpose of proving when this action was commenced, and which papers and proof of service show that this suit was commenced on the 27th day of April, 1860. The defendant here
43 rested his case.

And thereupon the said counsel for the plaintiff did recal Wm. Longhurst as a witness, who testified as follows: "There were several contracts for the completion of the Lawrence block made with me personally. The work in these bills annexed to the petition in the suit in the district court was performed under verbal contracts I made with E. C. David. I made out the estimates and made the contract on my own account. In constructing the three-story addition I figured my portion for the carpenter and joiner's work, and Berry and Playter figured theirs for the mason work. Each made proposals and submitted them to David. The extra work was done at less rates than the price in the principal contract, and was done under special contract with E. C. David. Some of the work was done by the day and fully agreed to by David. The ar-

rangement between us was that each should draw his own money.
The amount due Berry and Playter was some $2,096, and mine
44 $3,043. I went up to Bates's office within two weeks after
the loss. Bates, who was agent of the company in Dubuque, told me he understood that my interest was a mechanic's lien, both in my favor and with Berry, Playter and Longhurst. He said it would be necessary to show to the company what my interest was. I subsequently proved it up so."

The foregoing testimony, relating to the interview and conversation with Mr. Bates, was objected to by defendant's counsel before said testimony was given, on the ground that it is incompetent; 2d, that the agent, Mr. Bates, had no authority to change the condition of the policy; 3d, the petition alleges that proof of loss was made according to the provisions of the policy. The objection was overruled by the court, and defendant's counsel excepted thereto. The said witness further testified: "We had the contract pretty much completed when Ball, the plumber, commenced."

45 On his cross-examination the said witness further testified: "The conversation with Mr. Bates was within two weeks after the loss. Mr. Bates told me that I must establish the lien by the judgment of the court before my proof would be complete, and when I got the judgment the company would act; that nothing further could be done till then; that he would write the company about the matter. Afterwards he told me the company could do nothing till the judgments were obtained. Suits were brought, and judgments were obtained as soon as we could get them. Suits on this policy would have been brought before if Bates had not told me nothing could be done. I asked Mr. Bates what he considered my policy insured. He said he intended it to cover my interest in both claims. He said he knew of my interest with Berry and Playter at the time the policy was issued. Mr. Bates told me I would have to prove
46 up my claim so the company could understand it. The proof was not made at that time."

On his direct examination the witness further testified: "I think Mr. Shiras told me to go and see Mr. Bates. He, Bates, told me it would be necessary to show what interest I had in the building. The proofs I did furnish after this are those dated March 1st, 1858."

The testimony last above, on the direct examination, was objected to by defendant's counsel on the same grounds as last above.

On his cross-examination the said witness further testified: "Mr. Bates told me it was necessary for me to prove my interest in order to get my insurance."

And the said plaintiff, by his counsel, did further offer as a witness L. A. Lull, who, being duly sworn, testified as follows: "The papers and letters of this company were handed over to me by the agent. I cannot say that the letters turned over to me are preserved.
47 Mr. Farmer burned a large number of letters, and I presume those of this company were among them. He had more charge of the letters than I had. All the papers in that desk were burned."

And the said counsel for the plaintiff did further offer testimony by

recalling H. A. Littleton, who testified as follows: "I wrote a letter once to this company. I know of Mr. Shipman being here, an agent in 1859. I have talked with Mr. Field, and also with Mr. Shipman. Littleton and Smith done some business for the defendant. I was not appointed agent till January, 1859."

On his cross-examination the said witness further testified:

48 This company, the defendant, had a general agent at Chicago. It was my duty to write to the company in case of loss, and the company adjusted its own losses, either by general agent or by local agent, under instructions.

And on his direct examination the witness further testified:

"The proofs of loss are furnished to the local agent."

And the said plaintiff, by his counsel, further offered evidence by recalling O. P. Shiras, who testified as follows:

"I served the certificate of notary public, required by the policy, on Bates at his office."

The following is a copy of the said certificate of the notary public:

STATE OF IOWA,
Dubuque County, ss:

I, Charles H. Perrigo, a notary public in and for the county of Dubuque aforesaid, do hereby certify that I have examined the circumstances attending the destruction by fire of the building known as the St. Cloud hotel, or the Lawrence block, in the city of Dubuque, on the evening of the 21st of January last; that I am acquainted with the character and circumstances of William Longhurst; and that I verily believe that he has by misfortune and without foul or evil

49 practice sustained loss and damage on the said St. Cloud hotel, or Lawrance block, in consequence of said fire, to the amount of eighteen thousand dollars.

I also certify that I live contiguous to the spot where the fire took place; and that I am not concerned in the loss as a creditor, or otherwise, or related to the assumed or sufferers by said fire.

[L. S.] Witness my hand and notarial seal at the city of Dubuque, in said county, this 25th day of January, A. D. 1858.

CHARLES H. PERRIGO.

And the said counsel for the plaintiff did further offer as a witness H. F. Playtes, who being duly sworn, testified as follows:

I am one of the firm of Berry, Playter & Longhurst. Longhurst figured up the price for his own part of the work on the Lawrence Block, being carpenter work, and Berry and Playter figured theirs.

Mr. David desired the contract to be signed by the three parties, was the reason it was so signed. We divided our money; Longhurst took his part and we took ours.

The extra work was specially contracted for. We, B. & P., had a special contract with David for doing the extra mason work, and Longhurst had a special contract for all the extra carpenter work. No extra work was done under the general contract.

50 And the said counsel for plaintiff did further offer in evidence the letter, press copies of letters, purporting to have been written by J. F. Bates, agent of defendant at Dubuque, to the said company, which said offer and evidence were objected to by the said defendant's counsel, on the ground that the same is immaterial and incompetent.

The court overruled the objection, and permitted said letters to be read in evidence, to which ruling said defendant's counsel did then and there except.

The following is a copy of the said letters so read in evidence as aforesaid:

DUBUQUE, IOWA, *Jan'y 26th*, 1858.

DEAR SIR: I am happy to inform you that loss under policy No. 41 has been settled for fifty dollars, the city paying 25 dollars and Commonwealth 25 dollars. Mr. Corkery claimed 218 dollars for stolen goods, which we respectfully declined to pay.

The loss under policy No. 38, William Longhurst, we cannot do anything about until the lien is perfected, and on all matters will keep you informed. Several companies are with you on the lien, and we shall work unitedly.

The St. Cloud hotel was one of the grandest structures in the west, and a credit to the State. It cost 100,000 dollars; insured for $80,000.

We all hope to reduce the lien of Mr. Longhurst, but cannot tell anything about it till the owner of the building returns.

51 We are thinking seriously of rebuilding the hotel, by which we hope to save $20,000.

I am yours, very truly,

J. F. BATES, *Agent.*

L. BRAINARD, Esq.,
Sec'y City Fire Ins. Com.

DUBUQUE, IOWA, *February 1st*, 1858.

DEAR SIR: Your communication of the 26 ult. came to hand yesterday morning. Enclosed please find proofs of loss, I believe full and complete, and containing copies of all policies, &c. If not correct, please inform me. I have already been garnished not to pay any money to Mr. Longhurst in a suit which has been commenced against him by Leeman, Keeman & Co., of this city, for work done *for work done*, materials furnished, &c.

Then Mr. Longhurst must perfect his lien in the court before we can pay him anything. This will not be done before May, and perhaps not before August or November; and if carried to the Supreme Court, will not be determined under one year from now.

He may not obtain judgment against the owners for half the amount, and may for the whole.

Both of the above suits will have to be determined before anything is paid by your company. We shall try to take the benefit of the law in regard to mortgage liens; and if the matter does not get mangled

52 up by transfers, &c., we hope to be able to collect the whole amount of your loss of the owners of the building.

Whatever legal advantage we can take under our lien you shall have the benefit of. Your letter of the 26 ult. I was very much surprised to receive. Why you should blame me on the occasion of the first loss at this agency on a simple telegraph despatch, before asking for an explanation, I am truly unable to determine. To charge me with "deliberately working you into a loss," against your instructions, and that a few such would easily ruin the business of the strongest company in the land, you, as a business man, and as a man of long experience in the insurance business, must see, upon reflection, is all wrong.

If Littleton and Farmer had been your agents, you would be in for some $10,000 dollars. The Phœnix loses that amount, and their letters to Mr. L. are of the most pleasant character. They pocket the loss and hope for better luck next time.

Now, as to the facts: the St. Cloud hotel, or Lawrence block, was one of the finest buildings in the State, and was erected at a cost of some 110,000 dollars. It was but just completed, only a short time since, at least, and every effort was being made by the owners to get some good responsible person to take the hotel part; and had it not been for the fire, the whole building would have been occupied before this.

The insurance on building, independent of liens, was not
53 beyond the rule, as compared with owners' interest.

I could have procured 1,000 additional on building, but would not take it.

I have taken much pains to comply with your instructions, and kept up the rates at a loss to myself, and now I don't wish to be blamed without a cause.

Your risks are better than those of any other companies represented in Dubuque.

Please answer my letter of Jan'y 16, and oblige. Report to-morrow.

I am yours, truly,

J. F. BATES, *Agent.*

H. D. CONDIT, Esq.,
Hartford, Conn.

IOWA, DUBUQUE, *February* 1, 1858.

DEAR SIR: By to-day's express I send you the long promised diagram of Dubuque, giving a survey of all buildings in the business portion of the city.

You will find an explanation of lines, colors, &c., in the commencement of the book, that you may readily glance at all your risks within the range of surveys.

I give you the following memorandum of reference:

(Here follows the reference.)

The last named policy taken in February, and not reported. All policies not numbered above are either outside of the surveyed limits, or have expired, or been cancelled.

54 If you see anything inconsistent with description and sur-

vey of risks heretofore given, please inform me promptly, that the diagram may be corrected or explanation made.

Buildings on diagram are numbered with black ink. There are, probably, some errors in diagram, and as they appear will inform you.

Yours of the 5th received. On Monday I will answer fully and explain all matters. Most all of the companies have signified their intention to rebuild. When will your secretary be here? In my next I will give you some information regarding the loss and the legal position in which you are placed, with a view to obtain your opinion in return. Please acknowledge receipt of diagram.

I am yours, truly,

J. F. BATES, *Agent.*

H. D. CONDICT, Esq.,
Pres'd't City Fire Ins. Co., Hartford, Conn.

DUBUQUE, IOWA, *February*, 1858.

H. D. CONDICT, Esq., *President:*

DEAR SIR: I will now reply to yours of the 5th, having been unable to do so before on account of a press of business.

I was not as particular to give you information as to the intended occupancy of the whole of the Lawrence block, as, by terms of policy, the upper portion could not be used for any purpose
55 without your knowledge. The policy says, occupied for stores below, it being five stories high, indicated a different building from an ordinary block of stores.

I now see it would have been much more satisfactory to you had I given you a full description of the building and stated the uses for which it was erected.

I agree with you that "its being a fine building and a costly one does not make it a good risk." I never intended that you should understand me as giving the above as a reason for taking it.

I had not forgotten your instructions in regard to the Argyle House risk, and had I regarded the Lawrence block as entirely within the rule laid down by you I should not have taken it. Neither did any of the agents here so regard it.

I think I can explain the matter to yourself or secretary, personally, to your entire satisfaction, when here, and much better than on paper. My remark in regard to Mr. Littleton I got from his own lips, which, of course, is no excuse for me violating instructions, if I have done so. You ask, "Did he place 10,000 dollars for any of his other companies there?" I answer, yes. A short time before the fire, about Dec. 25th, Messrs. Strain, Conley & Co. (dry goods) removed from the building, and a policy in Ætna for $5,000 was transferred, and about the same time Mr. Kelly (furniture) removed, and a policy of $2,500, as in Ætna, was transferred or can-
56 celled. Mr. L. had also $5,000 on Strain, Connelly & Co.; so that a short time before the fire those of his Co. had $10,000 each in force at same time, (Ætna and Phœnix,) and had not above

parties removed, Mr. L. undoubtedly have had the whole amount in force at time of fire.

Do you think Ætna Co. did right, after having marked risk undesirable on ground that it was a bad investment of money to remain quiet under a liability of 10,000 dollars? You ask for an explanation of this remark of mine, "but for the panic the whole building would have been occupied before this," and ask, "Why, then, does one policy prohibit occupation of the premises above for the time of this existence?" I answer, the rate on the building and furniture was fixed by all the agents at 2½, provided the hotel part was occupied; consequently, by saying "the upper part to remain unoccupied," it involved the necessity of accused making a new arrangement and paying an additional rate in case of such occupancy. It seems to me this is a common mode of stating it when an additional rate depends upon a contingency. Is it not correct?

Your surmises regarding Longhurst and the owner are incorrect. The owner had possession of the building long before the fire.

Mr. Littleton, who gave me the risk, and who was instructed to get the whole insured, did not know of any dispute between
57 owner and Longhurst at the time risk was taken. Had I known of any, would not have taken the risk without consulting you at least.

If Mr. Longhurst burned the building, it seems to me he would not have been so willing to have the building reconstructed.

Besides, I see nothing to be gained by him doing so, at least until his lien was established by the courts.

The mere fact of a dispute between Longhurst and the owner would not probably interfere with the legality of the insurance.

If he has a lien finally established by courts, I suppose the same lien existed at the time of the insurance. The owner disputing it does not make it less a lien. I trust your secretary, or some one from your company, will soon be here and make a careful investigation of everything done by me as agent. I earnestly desire such an investigation.

It is almost impossible to explain matters fully by letter.

Yours, truly,

J. F. BATES, *Agent.*

And the said counsel for the plaintiff did further recall H. A. Littleton, who testified as follows: The instructions given by insurance companies to their agents are not made known to the accused. I have in a number of instances gone beyond my instructions as agent in the matter of risks; sometimes my principal has disposed of it, and sometimes not. I have been both a general and a local
58 insurance agent. I have frequently settled small claims, and where they were not large amounts, without consulting the company.

Local agents are in the habit of changing conditions. As a general thing, the change of condition by me has been approved of by the company I represented.

The foregoing testimony given by the witness, Littleton, was objected to by the defendant's counsel, before the same was given, on the ground that it is incompetent.

2d. That custom among insurance agents is not evidence of authority of agent of defendant to change or alter any of the conditions of the policy after the loss had occurred.

The objection was overruled by the court, and the testimony taken, subject to said objection. Defendant's counsel excepted to the ruling of the court.

On his cross-examination the said witness further testified:

The companies I represented had had some insurance on this mechanic's lien. There is no custom in Dubuque among insurance agents to waive an express condition of policy where they are forbidden by the company doing it.

I do not know of any instance where the agents of an insurance company has adjusted or settled a claim for loss that amounted to $3,000 without the approval of the company.

Losses are adjusted through local agents after proof of loss has been submitted to the company. At the time this insurance was
59 taken I represented the Ætna, Phœnix, Home, Star of Ogdensburgh, Niagara, and Lispenard, and Loudon companies. I did not adjust any of the losses for those companies till after consulting the companies, and then under their directions.

The companies I represented as agent had $42,000 insurance on the building and mechanics' liens. I settled none *none* of those. There was no custom of settling when it was not fair.

I don't think I ever informed Longhurst that I had any authority to settle or pay his claim against this def't.

I do not know of any instance of an insurance agent waiving an express condition of a policy to be performed before a loss after the loss had occurred.

The books of this company that Bates had as agent were passed over to me. The instructions that are given are for the guidance and control of the agent. I do not know of their being violated after loss. Before loss I have known of their being violated, such as insuring hotels when prohibited.

On his direct examination the said witness further testified: It is customary for companies to furnish blanks for proofs of loss, and agents fill them out for the assured.

On his further cross-examination the said witness further testified:
It is customary, I mean, for some companies to furnish blanks,
60 and some do not. I have always charged the assured for filling out proofs of loss.

And the council for the plaintiff did further recall J. W. Smith as a witness, who testified as follows: I am an insurance agent; have been insurance agent five years. I represent eight or nine companies.

The instructions to agents are private. The instructions are not generally made known to the assured. I have known of other agents settling losses without consulting their companies where the same did not exceed one thousand dollars. The company afterwards ap-

proved of the act. In one case I had that of the loss of Arthur; I required no proof. The loss was small, some 300 or 400 dollars.

The foregoing testimony was objected to by the defendant's counsel, before the same was given, on the ground that it is incompetent. 2d. Custom among insurance agents is not evidence of authority of agents of the defendant to change or alter any of the conditions of the policy after the loss had occured.

The objection was overruled by the court, and evidence permitted to be given, to which ruling of the court the defendant's counsel excepted.

On his cross-examination the said witness further testified: "I cannot say what the custom was with other agents in paying losses without sending proofs to their companies. I do not know
61 what the general custom is with other agents in paying losses. We did not have but three losses. I do not know of any custom in Dubuque among agents to adjust and settle losses without directions from their companies."

And the said counsel for the plaintiff did further offer as a witness J. H. Lull, who, being duly sworn, testified as follows: I always supposed that the instructions to agents were private, and sometimes marked so.

We, as agents, are not always bound by them. We exceed the instructions sometimes in taking risks. We frequently issue the policy without receiving premium, and hold ourselves responsible to the company for the amount. It is very difficult for me to tell what the custom of agents is at this place. I have sometimes paid small losses without submitting proofs to the company.

The foregoing testimony was objected to by the said defendant's counsel, before the same was given, on the same grounds as made to the testimony of witnesses. Littleton snd Smith lost above, and the objection was overruled by the court, and excepted to by defendant.

On his cross-examination the witness further testified: The insurance companies would direct me to pay the loss, except when the loss was small. In case of large losses, I always refer the matter to the company. I know not what the custom with other agents is in
62 such matters. I have charged the assured for making up proofs of losses. I have charged as high as $10 for making such proofs. I do not know of any custom among agents in Dubuque of waiving an express condition of the policy after loss. I do not know of a single instance where an express condition of the policy was waived after a loss.

On his direct examination he further testified: It is the custom to notify the assured of what is necessary to make out the proof of loss. The Phœnix Company had a policy on their risk for $5,000, and paid $4,000 on settlement. Longhurst gave a bond of indemnity, but think it was not to repay the money if the other companies beat him in the suit.

And the said counsel for the plaintiff did further recall William

Longhurst as a witness, who testified further, as follows: I had several conversations with Mr. Bates, the agent at Dubuque. He always told me I would have to prove up any mechanic's lien before the company would settle it. He said they would require it to be proved up. This was after he had said he had written to the company.

The foregoing testimony of said witness was objected to by defendants' counsel on the same grounds as made to the testimony of the witnesses Littleton, Smith and Lull, above, which objection was overruled by the court, and defendant excepted thereto.

On his cross-examination the said witness further testified:
63 Messrs. Bissel, Mills and Shirns, my attorneys, had the entire control of my claim against David, and in bringing suit on it for a mechanic's lien. Mr. Shirns told me, soon after the fire, to go and see Mr. Bates, and see what he required. I do not remember of Bates showing me the letter of the company."

And the said counsel for the plaintiff did further recall O. P. Shirns as a witness, who further testified: "A few days after the loss I called on Mr. Bates with the first proofs of loss. I told him we were about to commence suits for the lien. I told him, as we understood it, it would be necessary to establish our lien; he replied that he so understood it."

The foregoing testimony was objected to by the defendant's counsel, before the same was given, on the same grounds made to that of the witnesses Littleton, Smith and Lull, as above. The objection was overruled by the court, and exception taken by defendant's counsel.

On his cross-examination the said witness further testified: I did not go to Bates to get a waiver of any condition of the policy. I did not go to him to learn the law applicable to the case. I told him we should have to establish our lien. I went to see if the first proofs of loss were sufficient. I did not disclose to Bates that I regarded it as a waiver.

I expressed my opinion on the subject, that the lien would
64 have to be established, and he agreed with me. I had the second proof of loss made under his suggestion. I did not say one word to Bates about waiving the six months' condition.

I did not go there for the purpose of getting any waiver of condition of the policy; the policy was not referred to. I did not suppose that the company would set it up.

The said plaintiff did then again rest his cause.

And thereupon the said counsel for the defendant did, on its behalf, offer in evidence, and which were received in evidence, the letters written by said defendant to its agent, Bates, in reply to those written by him and offered in evidence by said plaintiff.

The said letters is as follows:

CITY FIRE INSURANCE COMPANY,
Hartford, January 30th, 1858.

J. H. BATES, Esq., *Dubuque:*

DEAR SIR: Yours of the 26th instant is received. In all cases of loss adhere strictly to the directions given in the printed instructions. We do not want ourselves in any way hampered or trammelled by the action of agents on our behalf. We intend giving personal attention to such matters, and shall send our secretary or some other member of the company to look after our interests in that hotel loss. The loss under policy No. 41 is so small that it alone would not call for special examinations; but as our secretary will be on hand, you may defer any further steps until his arrival.

65 It is probably the interest of all the companies to unite in settling the hotel claim. If the lien was not perfected, as you write, what right had the party to a policy? If not a right or interest in the building sufficient to constitute a lien, what right of recovery?

Yours, truly, H. D. CONDICT,
President.

"In reply to yours of 16th, better suspend policy while the upper portion of the building is used as a theatre. Call the secy's attention to it when he is with you."

And the said defendant, by its counsel, did further offer D. M. Kenzie as a witness, who testified as follows: "This book shown me is the same book delivered to me as agent of the defendant. It was delivered to me by Littleton as the agency book of this company. The instructions to agents contained in said book were in just the same when I received the book as now." Among said instructions which were offered and received in evidence is the following, to wit: In no case are you authorized to waive a strict and literal compliance with those conditions on the part of the assured. And you will carefully avoid everything that may be construed by him as such waiver.

The witness further testified: "There was another book delivered to me by Mr. Littleton, as the book of the company for the use of agents, like the one shown me. In that book, which was also

66 a book of instructions put forth by the general agent, was the following: Agents should take no part in preparing or making proofs of loss. Let the assured take his own course in this; courteous treatment is all he can expect from you."

The said witness further testified: I have been insurance agent at Dubuque about four years. Have represented three companies. I do not know of any custom at Dubuque among agents to waive an express condition of the policy. We have sometimes issued the policy without receiving the premium; we held ourselves responsible to the com'y for the premium.

And the said defendant, by its counsel, did further as a witness M. D. Bisel, who, being sworn, testified as follows: I have been connected with insurance companies some five or six years at Dubuque.

Bissel & Co., of which firm I am a member, have been agents for the Hartford and City Fire Insurance Company. I have not known of agents waiving an express condition of policy except in receipt of premiums. I have not known of agents violating instructions. Our custom is to report losses to the company. I know of no such custom as agents disregarding the directions contained in the letter of date Jan'y 30th, 1858, written by def't to Bates.

We settled one loss for about $20 on our own responsibility. Bissel & Co. are now the agents for def't at Dubuque.

We observe instructions to us; don't know how it is with other agents.

67 On his cross-examination the said witness further testified: "Not over a half dozen losses have occurred with us."

And the said defendant, by its counsel, did further offer as a witness W. Allison, who, being sworn, testified as follows:

"I am an insurance agent in Dubuque. Have been such agent five or six years. Have represented ten or twelve companies. So far as I know, it has not been a custom to adjust losses by agents till the proofs of loss have been submitted and directions given by the company. "I know of no custom among agents waiving conditions of a policy."

On his cross-examination the witness further testified: "I have had half dozen losses. Some two small losses have been adjusted by me under special directions by the company."

And the said defendant, by its counsel, did further recall as a witness E. C. David, who testified: "I have been insurance agent at Dubuque over two years. My practice has been to consult the company on questions of waiver of conditions of the policy. I know of no custom here among agents to waive express conditions of a policy."

And the said defendant, by its counsel, did further offer as a witness L. Brainard, who, being sworn, testified:

"I have been secretary of the def't; commenced nine years ago. I resigned in the spring of 1858. I came here from Hartford, I think, in February; may have been as late as March, 1858. I then

68 saw Longhurst, E. C. David, and saw the attorneys of the company. I explained to Longhurst the character in which I acted. I talked with Longhurst, as representative of the company; talked with in reference to the facts of loss, origin of the fire, and his interest in the building. During my connexion with this Co. its universal custom was to have losses referred to the home office, and local agents had no authority to settle them except by its direction.

"I came here to look into it, not to settle the loss. The company never permitted agents to waive any of the conditions of the insurance. But I have known agents to issue issuing policies without receiving the premium in advance, holding themselves responsible to the company for the same."

And the said counsel for the defenda'ts did further offer as a witness S. H. Price, who being sworn, testified as follows: "My agency

commenced with the defendant on the first of April, 1858. I was their assistant general agent. I have been general agent since April, 1859. Our local agents have no authority to adjust losses. That is done by the company. We direct to carry out the instructions to agents. It is not expected that agents should adjust losses."

On his cross-examination after the proofs of loss have been furnished to the Co. the local agent is generally instructed to settle such losses. All communications to the company are generally made through local agents.

69 On his cross-examination the said witness further testified: "The local agents are sometimes specially authorized to adjust losses, but this is not the rule."

Which said evidence set forth herein as aforesaid comprise all the evidence given on the trial of the said action.

And the said district judge did then and there give his opinion and instruction to the jury on the subject of the occupancy of the said building insured for stores below, as follows: That the terms "occupied for stores below," in the written part of the policy, imply that the building was so occupied at the *at the* time of the delivery of the policy to the defendant. That the words "the upper part to remain unoccupied during the continuance of this policy" imply that the upper part of the building was unoccupied at the time of the execution of the policy, and should so continue during the continuance of the policy. That those words amount to a warranty, and if they were not true, and not complied with, the plaintiff could not recover.

And to which said opinion and instruction of the said district judge the said defendant, by its counsel, did then and there except.

And the said district judge did then and there give his opinion and instruction to the jury on the subject of the occupancy of the basement of the said building for dancing academy, as follows:

70 That dancing schools are not, in the opinion of the court, expressly prohibited by the conditions of the policy; and unless the jury find from the evidence that the risk of fire was incurred by the temporary occupancy of the basement of the building for that purpose, the plaintiff's right to recover is not defeated by the fact of such temporary occupancy.

And to which said opinion and instruction of the said district judge the said defendant, by its counsel, did then and there except.

And the said district judge did then and there further give his opinion and instruction to the jury, as follows:

If the jury believe from the evidence that the building was used for the purpose of storing therein spirituous liquors, then and from thenceforth so long as the same was so appropriated or used the policy was void and of no effect; but any mere casual or temporary use not amounting to storing of liquors would not come within that provision.

At the request of the said plaintiff's counsel the said district judge did then and there further give his opinion and instruction to the jury: That to entitle the plaintiff to recover in this action, it is neces-

sary for the plaintiff to establish by evidence the following facts or propositions:

1st. That a policy of insurance was issued by defendant, as averred in the petition.

2d. That the plaintiff at the time of the insurance and at the time of the loss had an insurable interest in the property described in the policy.

71 3d. That the plaintiff furnished the defendant with the proofs of loss as required by the conditions of policy.

4th. That plaintiff has shown a sufficient excuse for not bringing suit within six months from the time of the loss, or a waiver of the limitation in section 15 of the conditions upon said policy.

And the said district judge did then and there, at the request of the said plaintiff's counsel, further give his opinion and instruction to the jury, that, "1st, the policy itself establishes the first of the foregoing propositions."

And the said district judge did then and there, at the request of the said plaintiff's counsel, further give his opinion and instruction to the jury, that "a mechanic's lien is an insurable interest, and it is not necessary to have such herein established by the judgment of any court before the date of the insurance, or before the date of the loss." And to which said opinion and instruction of the said district judge the said defendant, by its counsel, did then and there except.

And the said district judge did then and there, at the request of the said plaintiff's counsel, further give his opinion and in-

72 struction to the jury, "that if the notice and proofs of loss were furnished to the defendant or its authorized agent, and no objection was made at the time, or within a reasonable time thereafter; or if objection was made, and the defect pointed out by the defendant or its authorized agent, and such defect was supplied at as early a day as possible, and such final proofs were received by the defendant, it will be deemed to have waived all other defects in the proof, and cannot, at the trial for the first time, object that the notice and proofs are not made out in accordance with the requirements of the policy;" and to which said opinion and instruction of the said district judge the said defendant, by its counsel, did then and there except.

And the said district judge did then and there, at the request of the said plaintiff's counsel, further give his opinion and instruction to the jury, "that the defendant will be deemed to have waived any defect in notice and proofs of loss, if its conduct has been such in not objecting as to mislead the plaintiff as to his duty, or the requirements of the company in making such notice or proofs;" and to which said opinion and instruction of the said district judge the said defendant, by its counsel, did then and there except.

And the said district judge did then and there, at the request of the said plaintiff's counsel, further give his opinion and instruction to the jury, that the defendant will have been deemed to

73 have waived the conditions in section 15, if its acts, or those

of its authorized agents, were such as to justify the plaintiff in supposing that it was not intended to be insisted upon, or that, by the act of the defendant or his authorized agents, the plaintiff was prevented from bringing his suit until after the expiration of six months; and to which opinion and instruction of the said district judge the said defendant, by its counsel, did then and there except.

And the said district judge did then and there, at the request of the said plaintiff's counsel, further give his opinion and instruction to the jury, that "the jury are to determine from all the evidence whether Bates, the agent of defendant, had authority to waive such condition expressly, or by its acts; and if the jury believe, from the evidence, that it was customary for local agents at Dubuque to exercise such authority, or if the jury believe, from the evidence, that the local agents at Dubuque were in the habit of adjusting and settling losses with or without consultation with the principal officer, then the plaintiff had a right to presume that said Bates was authorized to waive such condition, and the defendant must prove that said Bates had no such authority, and that plaintiff knew that he had no such authority;" and to which said opinion and instruction of the said district judge thus given, the said defendant, by its counsel, did then and there except.

And the said district judge did there and then, of his own motion on the same subject, further give his opinion and instruction
74 to the jury as follows:

"But if, on the other hand, the jury believe, from the evidence, that local agents were not in the habit of adjusting and settling losses, except as to small amounts, and never in any case to the amount of one thousand dollars or upwards, then no inference can arise, from said habit of business, that said Bates was authorized to waive the express condition of section fifteen."

And the said district judge did then and there, at the request of the said plaintiff's counsel, further give his opinion and instructions to the jury, that "the question for the jury is not what power the agent actually possessed, but what power the plaintiff were justified in presuming he possessed;" and to which said opinion and instruction of the said district judge thus given, the said defendant, by its counsel, did then and there except.

And the said district judge did then and there, of his own motion on this same subject, further give his opinion and instruction to the jury as follows:

"But even if the jury are satisfied, from the evidence, that the said Bates was authorized to waive, and did waive, the strict performance of said condition, it was competent, at any time before the expiration of six months, for the defendant to withdraw his authority or annul his act; and if the defendant, at any time be-
75 fore the expiration of said six months, notified the plaintiff or his authorized attorney that they insisted upon the performance of the conditions of said fifteenth section, such notification was sufficient to annul said waiver."

And the said district judge did then and there, at the request of

said plaintiff's counsel, further give his opinion and instructions, "that the policy does not require that every part or room of the lower part of the building should at the time be occupied for stores; but the language of the policy is intended to express the designed use of that part of the building, and not that any particular kind of business was at the time carried on there."

2d. "The use of the lower part of building is not restricted to any particular kind of store; and therefore, any kind of store business might be carried on there, not forbidden by the terms of the policy."

3d. "A matter of misrepresentation or concealment to avoid the policy must be a matter material to the risk;" and to which said opinion and instruction, except that marked No. 3, the said defendant, by its counsel, did then and there except.

At the request of the said defendant's counsel, the said district judge did further instruct the jury, that section fifteen of the conditions of insurance in the policy in question in this action contains the condition, namely:

76 "XV. It is further hereby expressly provided, that no suit or action of any kind" against said company for the recovery "of any claim upon, under, or by virtue of this policy, shall be sustainable in any court of law or chancery, unless such suit or action shall be commenced within the term of six months next after any loss or damage shall have occurred; and in case such suit or action shall be commenced against said company after the expiration of six months next after such loss or damage shall have occurred the lapse of time shall be taken and deemed as conclusive evidence against the validity of the claim thereby so attempted to be enforced."

"This condition entered into, and was part of the contract of insurance, and is a legal and valid condition of the policy, binding on the plaintiff, and is a bar to this action, unless the condition has either been complied with by plaintiff, or has been waived by defendant. And if the jury believe from the evidence that said section fifteen was one of the conditions of said policy, and that this action was not commenced within six months after the said loss occurred, and that said defendant has not waived said condition, then they must find for the defendant."

And the said district judge did then and there, at the request of the said defendant's counsel, further instructed the said jury,

77 that a waiver could only be made by the defendant or its authorized agent; that is, by a person authorized by the company to make such waiver.

The authority conferred on Bates to sign and deliver the policy and receive the premium for defendant as agent, did not authorize him to waive said condition fifteen or any other condition of the policy.

And the said district judge did then and there, of his own motion, further instruct the jury on the same point as follows:

"But the authority to adjust and settle losses is more comprehensive; and if the jury believe from the evidence that said Bates was *was* authorized to adjust and settle, he might by virtue of that authority

waive the strict performance of the condition to sue within six months;" and to which said opinion and instruction last aforesaid of the said district judge, the said defendant, by its counsel, did then and there except.

And the said district judge did then and there, at the request of the said defendant's counsel, further instruct the jury, "that so also section nine of said conditions of insurance in said policy was a part of the contract of insurance, and binding on the plaintiff, and must be complied with by him before he can recover on the policy for loss or damage by fire, unless it has also been waived by defendant or by some person authorized by defendant to waive it."

78 And the said district judge did then and there, at the request of the said defendant's counsel, further instruct the jury "that the authority of Bates, or any other agent or person, to waive the performance of said condition fifteen and nine, must be either express or implied;" and the said defendant's counsel did then and there request the said district judge to instruct the jury that "such authority cannot be proved by showing the custom or usage among local insurance agents at Dubuque;" which said instructions the said district judge refused to give to the jury, and to which refusal the said defendant's counsel did then and there except. And the said district judge did then and there, at the request of the said defendant's counsel, further instruct the jury, "that, to prove a custom among insurance agents at Dubuque, the plaintiff must show a usage which is reasonable—so general, constant, so well settled, and of so long continuance, as to raise a fair presumption that it was known to both contracting parties."

And the said district judge did also, of his own motion, further add to said instruction and say, "the usage or custom is not proved to effect the contract so as in any degree to contradict or vary the same, but merely to show the extent of the agent's authority." And the said district judge did then and there, at the request of the said defendant's counsel, further instruct the jury, "that if plaintiff produce creditable and competent witnesses who testify to the alleged custom, and defendant produce witnesses, greater in number and equal in creditability and competency, who testify that there is no such custom or usage, and that they never have known or heard of any such, the jury should find against the existence of the alleged custom or usage, the preponderance of testimony being against the existence of such custom or usage."

79 And the said district judge did then and there, at the request of the said defendant's counsel, further instruct the jury, that it is immaterial whether the agents frequently sign and deliver their policies before the premiums are paid, according to section second of said conditions of insurance; that "no insurance, whether original or continued, shall be considered as binding until the actual payments of the premiums;" the agents became personally responsible for the payment of such premiums to their respective companies. Such omission to recognize the payment of premiums at the time arrived, became a settled, uniform, general, and notorious usage to constitute a custom.

And the said district judge did then and there *and there*, at the request of the said defendant's counsel, further instruct the jury, that "a custom of agents to waive payment of the premium at the delivery of the policy, confers no authority to waive any other condition of the policy."

2d. "The law will not presume any custom to control, change, or vary the plain terms and expressed conditions of this policy."

3d. "The custom of other companies and their agents in settling or adjusting losses, or waiving conditions of the policy or instructions, are incompetent and immaterial in this action touching any matters plainly and expressly provided for and agreed to in this policy." Which last instruction the said judge modified by adding the following to the same:

"If this means that the terms of the policy cannot be
80 changed or waived by proof of any existing custom or usage, it is true; but if it means that a custom or usage cannot be given to show authority in an agent to waive the strict performance of the conditions of the policy, it is not true; the particular usages of other agents or companies are not material, except so far as they go to make up and prove a general custom in the place where the transaction in question occurred;" and to which said modification the said defendant's counsel did then and there except.

And the said district judge did then and there, at the request of the said defendant's counsel, further instruct the jury, that "the plaintiff must prove not only that Bates had authority to waive the said fifteenth condition, and also the ninth condition, but he must show that the said agent did in fact waive said condition."

2d. "The said condition nine provides that persons sustaining loss or damage by fire are forthwith to give notice thereof in writing to the company or its agent, and as soon after as possible they shall deliver as particular an account of their loss and damage as the nature of the case will admit, signed with their own hands," &c. It requires only such a particular account of loss and damage by plaintiff as the nature of the case will admit. If said condition was complied
with by plaintiff, and no objection has been made to such state-
81 ment by defendant, then the plaintiff's claim was fixed, and his loss ascertained and proved, and he was not prevented from commencing his action according to the conditions and within the time specified in said fifteenth condition of the policy.

3d. "At the time plaintiff procured the insurance, the nature and description and value of his interest was known to him; it was incorporated into the policy, as he chose to describe it, as a mechanic's lien; he voluntarily undertook and agreed, on taking the policy, that if a loss should occur, he would make and deliver an account and proof thereof, and commence an action or suit (if any) for his claim therefor, in the manner and within the time specified in said ninth and fifteenth conditions. If there was any uncertainty in the description of his interest, or a doubt as to the legal effect of said condition of the policy in connexion with said description, it was plaintiff's own fault. At all events, the terms and conditions of the policy

being written, plaintiff had no claim on def't to expound the law in relation thereto, and no opinion of the law in relation to said conditions, or either of them, or the necessity or effect of establishing said mechanic's lien by judgment." And the said district judge did then and there refuse to give the following as a part of said instruction, to wit: entertained by defendant or expressed by defendant,
82 or by said Bates to plaintiff, or to plaintiff's attorneys, could constitute a waiver of said conditions, or either of them; and to which refusal of said district judge the defendant's counsel did then and there except. And the said district judge did further modify the instruction given to the jury, as last aforesaid, by adding thereto and giving the following as modification of the same:

Nevertheless, if the defendant, or his authorized agent, did assume to expound the law of the contract, and did in fact so expound it as to justify the belief, on the part of the plaintiff, that he would waive the strict performance of said condition, then the defendant is bound by such waiver; and to which said modification the said def't, by its counsel, did then and there except.

And because none of the evidence, objections, and exceptions *and exceptions* to the same, nor the opinions, decisions, and instructions of the said district judge, do appear upon the record of the said trial, therefore, on the prayer of the said defendant, by his said counsel, the said district judge hath to this bill of exceptions set his hand and seal, according to the law in such case made and provided, and dated at the April term, 1861, of said court, held at the city of Dubuque.

J. M. LOVE, [SEAL.]
Judge of Dist. Court U. S., Dist. of Iowa.

Filed April term, 1861.

BURNS, *Clk.*

83 In the court at October term, 1860.

STATE OF IOWA,
Dubuque county, ss:

WILLIAM LONGHURST
vs.
THE CITY FIRE INSURANCE COMPANY of Hartford, Conn.

Your petitioner, William Longhurst, a citizen of the State of Iowa, claims of the defendant, the City Fire Insurance Company of Hartford, a corporation duly incorporated under the laws of the State of Connecticut, and a citizen of the State of Connecticut, the sum of three thousand dollars, and interest thereon from the 10th day of August, 1859, as money justly plaintiff from defendant; and for cause of such claims, states that theretofore, to wit, on the 19th day of November, 1857, the said defendant made and executed

a certain policy of insurance, duly signed and countersigned by the officers of defendant, whereby, in consideration of the sum of fifty-five dollars to them in hand paid by the plaintiff, said defendant insured plaintiff against loss or damage by fire to the amount of three thousand dollars, on the five-story brick building known as
84 Lawrence block, occupied for stores below; the upper portion to remain unoccupied during the continuance of this policy; the said premises situated on the east side of Main street, between 9th and 10th streets, in Dubuque, Iowa. It being the intention of said policy to cover a mechanic's lien on said building; whereby the said defendant, for the consideration above named, agreed and promised to make good to plaintiff, his executors, administrators, and assigns, all such loss or damage, not exceeding in amount the sum insured, as might happen by fire to the property as above specified, from the 19th day of November, 1857, commencing at 12 o'clock at noon, unto the full end of term of eleven months thence next ensuing, which term would expire on the 19th of October, 1858, at 12 o'clock at noon. The said loss or damage to be estimated according to the true and actual cash value of the said property, and to be paid within ninety days after due notice and proof thereof made by the insured, in conformity to the conditions annexed to said policy, as will more fully appear from a copy of said policy hereto attached and
85 made a part of this petition.

Plaintiff further states, that at the date aforesaid, and during the continuance and life of said policy, he was interested in the said premises insured to a large amount, to wit, to the sum of $18,000, said interest consisting in and being in the nature of a mechanic's lien upon the said insured premises. And plaintiff further state that afterwards, to wit, on the 22d day of January, 1858, the said insured premises were destroyed and consumed by fire, whereby plaintiff suffered loss and damage to a large amount, to wit, to the sum of seventeen thousand dollars. And plaintiff further avers that, immediately upon the happening of said fire, plaintiff gave notice of such loss to defendant, and duly furnished to defendant proofs of the loss sustained by defendant in accordance with the requirements of said policy, which said proofs of loss were finally completed and furnished to defendant on or about the 10th day of August, 1859; wherefore, by the terms of such policy, in ninety days from such date the defendant became justly indebted to pl'ff in the said
86 sum of $3,000. And plaintiff further avers that he has in good faith performed and carried out all and singular the said articles, stipulations, conditions, matters, and things which were to be observed and performed according to the form and conditions of said policy of insurance. And plaintiff avers that the said defendant, notwithstanding the said promises and agreements made and entered into by said defendant, had totally failed and neglected to perform and fulfil its said promises, and has totally failed to pay to said plaintiff the said sum of $3,000, or any part thereof, although often requested so to do, to the damage of plaintiff in the sum of $3,000. And plaintiff further avers that the said policy is still his property, and that the

said sum of $3,000 is due him thereon; wherefore pl'ff prays judgment against defendant for the said sum of $3,000, with interest and costs of suit.

BISSEL, MILLS & SHIRNS,
Att'ys for Plaintiff.

Filed Oct. 17th, 1860.

J. C. BURNS, *Cl'k.*

87 The following is copy of the exhibit annexed to the petition:

CITY FIRE INSURANCE COMPANY OF HARTFORD.

No. 38.—$3,000.

By this policy of insurance the City Fire Ins. Co. of Hartford, in consideration of fifty-five dollars to them in hand paid by the insured hereinafter named, the receipt whereof is hereby acknowledged, do insure William Longhurst against loss or damage by fire to the amount of three thousand dollars on the five-story brick building and three-story back building, known as "Lawrence block," occupied for stores below; the upper portion to remain unoccupied during the continuance of this policy; situated on east side of Main street, between 9th and 10th streets, Dubuque, Iowa. It is the intention of this policy to cover a mechanic's lien on said building, insured on said lien, as follows:

$2,000 in Star Ins. Co., N. Y.; $3,000 in Dubuque Union Co., Dubuque; 5,000 in Home Co., of N. Y.; and 5,000 in other companies.

3,000 ———, 11 months, 2 per ct. premium—$55. And the City Fire Insurance Company of Hartford, above named, for the con-

88 sideration aforesaid, do hereby promise and agree to make good unto the said assured, his executors, administrators, and assigns, all such loss or damage, not exceeding in amount the sum insured, as shall happen by fire to the property, as above specified, from the nineteenth day of November, one thousand eight hundred and fifty-seven, (at 12 o'clock at noon,) unto the full end and term of eleven months thence next ensuing, which term will expire on the nineteenth day of October, one thousand eight hundred and fifty-eight, (at 12 o'clock at noon,) the said loss or damage to be estimated according to the true and actual cash value of the said property at the time the same shall happen, and to be paid within ninety days, after due notice and proof thereof made by the insured, in conformity to the conditions annexed to this policy: Provided always, and it is hereby declared, that this corporation shall not be liable to make good any loss or damage by fire which may happen or take place by means of invasion, insurrection, riot or civil commotion, or of any military or usurped power, or any loss by theft at or after a

89 fire: And provided further, that in case the assured shall have already made any other insurance against loss by fire on the property hereby insured, and not notified to this corporation, and mentioned in or endorsed upon this policy, then this insurance shall be void and of no effect. And if the said insured or his assigns shall

hereafter make any other insurance on the same property, and shall not, with all reasonable diligence, give notice thereof to this corporation, and have the same endorsed on this instrument, or otherwise acknowledged by them in writing, this policy shall cease and be of no further effect. And in case of any other insurance upon the property hereby insured, whether prior or subsequent to the date of this policy, the insured shall not, in case of loss or damage, be entitled to demand, or recover on this policy, any greater portion of the loss or damage sustained than the amount hereby insured shall bear to the whole amount insured on the said property. And it is agreed and declared to be the true intent and meaning of the parties
90 hereto, that in case the above-mentioned premises shall, at any time after the making of and during the time this policy would otherwise continue in force, be appropriated, applied, or used to or for the purpose of carrying on or exercising therein any trade, business, or vocation, denominated hazardous or extra hazardous, or specified in the memorandum of special hazards in the terms and conditions annexed to this policy, or for the purpose of storing therein any of the articles, goods, or merchandise, in the same terms and conditions denominated hazardous, extra hazardous, or included in the memorandum of special hazard, except as herein specially provided for, or hereafter agreed to by this corporation in writing, to be added to or endorsed upon this policy, then, and from thenceforth, so long as the same shall be so appropriated, applied or used, these presents shall cease, and be of no force or effect. And it is further agreed that in case the above-mentioned premises shall, at any time after the making of and during the time this policy would
91 otherwise continue in force, become vacated, either by the removal of the owner or occupant of said premises, unless immediate notice of the same shall be given this company and mentioned in or indorsed upon this policy, this insurance shall be void and of no effect. And it is moreover agreed and declared that this insurance is not intended to apply to or cover any books of account, written securities, deeds, or other evidences of title to lands, nor to bonds, bills, notes, or other evidences of debt, nor to money or bullion. And that this policy is made and accepted in reference to the terms and conditions hereunto annexed, which are to be used and resorted to in order to explain the rights and obligations of the parties hereto in all cases not herein otherwise especially provided for.

This insurance (the risk not being changed) may be continued for such further term as shall be agreed on ; provided the premium therefore is paid, and endorsed on the policy, or a receipt
92 given for the same.

The interest of the insured in this policy is not assignable, unless by consent of this company manifested in writing ; and in case of any transfer or termination of the interest of the insured, either by sale or otherwise, without such consent, this policy shall from thenceforth be void, and of no effect. This policy shall not be valid till countersigned by Dedrick and Bates, agent of said City Fire Insurance Co. of Hartford. In witness whereof, the City Fire Insurance Company of

Hartford have caused these presents to be signed by their president, and attested by their secretary, in the city of Hartford, this day of Nov., in the year of our Lord one thousand eight hundred and fifty.

H. D. CONDICT, *President.*
S. BRAINARD, *Secretary.*

Countersigned at Dubuque this 19th day of November, 1857.
DEDRICK & BATES, *Agents.*

CLASSES OF HAZARDS.

Not hazardous.

Staple foreign dry goods in packages, and staple domestic dry goods, in stores where no hazardous merchandise is kept, and household furniture in dwelling-houses, may be insured at 5 cents per $100, in addition to the rate of the building.

93 *Hazardous.*

The following trades and occupations, goods, wares, and merchandise are deemed hazardous, and subject the building and all its contents to an additional charge of 10 cents per $100 ; they are : China, or earthen or glass ware, or plate-glass in boxes, crates or casks ; eating-houses or refectories, fire-crackers in packages, flax in bales, grocers' stock, gutta percha unmanufactured, hat ironing or trimming or pressing, hay pressed in bundles, hemp in bales, India-rubber unmanufactured, Manilla grass in bales, oil, porter-houses, rags in packages, sail making, cigar making, Sisal grass in bales, spirituous liquors, sugars, sulphur, tallow, taverns, wine dealers' stock, (not including wine in glass unpacked,) and wool.

The following are considered hazardous on account of their liability to damage, and are charged 10 cents per $100 in addition to but do not increase the rate of the building ; they are : Boots and shoes, brushes (stocks of,) card printing, coffee, cotton batting and wadding, dry goods (general stocks of,) flour, furs and peltries in packages, hardware and cutlery, hides and leather, indigo, looking-glasses in boxes, metals (in bars, rods, pigs or sheets,) paints ground in oil, paper-hangings, paper in reams, potash, rice, spices, tailors' stock, and ready-made clothing, teas, threshed grain, tin or sheet-iron or copper ware, wine in casks, wine in glass in packages, window or plate glass in boxes, and generally all other stocks of merchandise, (in buildings where fire-heat is not used for manufacturing,) not elsewhere enumerated.

Extra hazardous.

The following trades and occupations, goods, wares, and merchandise are deemed extra hazardous, and subject the building and al its contents to an additional rate of 20 cents per $100 ; they are : Alcohol, apothecaries' stock, bandbox and paper box making, basket bleaching or making, basket-sellers' stock, blacksmithing, block and pump making, box repairing, brass turning and working, brush-makers' stock, cabinet-makers' stock, carving, China, earthen or glass ware or looking-glasses with packing or unpacking, chocolate

making, colormen's stock, coopering, copper-plate printing, cotton in bales, cotton brokers' samples, daguerreotyping, drugs, (importers' stock, without inflammable acids or phosphorus,) essential oils, gilding, gutta percha goods, gun repairing, hat finishing (with use of fire-heat to steam and block the bodies,) India-rubber goods, lamp manufacturing, lime unslaked, liquor bottling, lithographing, morocco manufacturing, musical instrument makers' stock, oakum in bales, painters' stock, perfumers' stock, pitch, plumbing and pewtering, pocket-book making, printing of newspapers and engravings, rag and junk shop-stock, rosin, ship chandlery, spirits of turpentine, tar, tin or sheet iron or copper working, turning of wood, turpentine, umbrella making, upholstery manufacturing, varnish, and wooden-ware sellers' stock.

The following are considered extra hazardous on account of their great liability to damage, and are charged 20 cents per $100 in addition to, but do not increase the rate of the building; they are: Artificial flowers, booksellers' stock, cabinet ware, China, earthen or glass ware unpacked, confectioners' stock, daguerreotypists' stock, furs unpacked, jewelers' stock, lamp-sellers' stock, liquor in glass unpacked, milliners' stock, musical instruments and printed music, needles, optical and mathematical instrument makers' stock, pictures and prints, precious stones, pocketbook-makers' stock, silversmiths' stock, silver and plated ware, straw goods, stationers' stock, toy shopkeepers' stock, watch-makers' stock and tools, window or plate glass unpacked, and wine in glass unpacked.

Memorandum of special hazards.

Acids, (nitric, sulphuric, muriatic, and other acids causing ignition,) bakeries, bark mills, bleaching works, blind-makers' shops, bookbinderies, boat-builders' shops, brass foundries, breweries, brimstone works, brush manufactories, cabinet-makers' shops, chair-makers' shops, carpenters' shops, candle manufactories, camphene on sale, copper smiths' shops with forges, coffee and spice mills, chemical laboratories, coach-makers' shops, comb manufactories, confectionery manufactories, corn kilns, cotton mills, cotton presses, cotton unpacked, distilleries and rectifying establishments, dyeing establishments, druggists' stock, (wholesale,) drug and spice mills, ether, fur-dressing establishments, fire-works, fire-work manufactories, flax mills, floor cloth manufactories, fringe manufactories, fulling mills, flax unpacked, gas manufactories, grate manufactories, grist or flouring mills, gun manufactories, gunpowder, hat manufactories, hay unpacked, houses building or repairing, hemp unpacked, India-rubber or gutta percha manufactories, ink manufactories, iron foundries, ivory-black and lampblack manufactories, lime yards and sheds, livery stables, lumber yards, looking-glass and picture frame manufactories, machine shops, mahogany yards, malt houses, matches manufactories, metal mills, musical instrument manufactories, oil boiling houses, oil-cloth manufactories, oiled clothing manufactories, oil mills and manufactories, omnibus stables, plating, plated ware manufactories, packing buildings and yards, paper mills, paper-hangings manufactories, percussion-cap manufactories, perfumery manufactories, planing or

grooving or moulding mills, powder mills, printing of books and job printing, phosphorus, rope and cordage manufactories, safe (iron) manufactories, stove manufactories, saltpetre, sash-makers' shops, saw-mills, soap manufactories, silversmiths' manufactories, snuff mills, spirit gas manufactories and spirit gas on sale, stables, stave yards, steamboats, steam-engines in use, sugar refiners, tobacco manufactories, type and stereotype foundries, tallow melting establishments, tanneries, tar-boiling houses, theatres and other places of public exhibition, timber yards, turpentine distilleries, varnish manufactories, wool mills, wheelwrights' shops, and generally all mills and manufacturing establishments, and all trades and occupations requiring the use of fire-heat, not before enumerated.

Camphene, spirit gas or "burning fluid," when used in stores, warehouses, shops or manufactories, as a light, subjects the goods therein to an additional charge; and permission for such use must be endorsed in writing on the policy.

Gunpowder, phosphorus, and saltpetre, are expressly prohibited from being deposited, stored, or kept in any building insured, or containing any goods or merchandise insured by this policy, unless by special consent in writing on the policy.

Fences and privies, also store furniture and fixtures, must be separately and specifically insured.

Conditions of insurance.

I. Applications for insurance on property must be in writing, and must specify the construction and materials of the buildings to be insured, or containing the property to be insured; by whom occupied; whether as a private dwelling or how otherwise; its situation with respect to contiguous buildings, and their construction and materials; and whether any manufacturing is carried on within or about it; and, in relation to the insurance of goods and merchandise, whether or not they are of the description denominated hazardous, extra hazardous, or included in the memorandum of special hazards.

If any person insuring any building or goods in this office shall make any misrepresentation or concealment, or if, after insurance is effected, either by the original policy or by the renewal thereof, the risk be increased by any means whatever within the control of the insured, or if such building or premises shall be occupied in any way so as to render the risk more hazardous than at the time of insuring, such insurance shall be void, and of no effect.

If, during the insurance, the risk be increased by the erection of buildings, or by the use or occupation of neighboring premises, or otherwise, or if for any other cause the company shall so elect, it shall be optional with the company to terminate the insurance, after notice given to the insured, or his representative, or their intention to do so; in which case the company will refund a ratable proportion of the premium.

II. No insurance, whether original or continued, shall be considered as binding until the actual payment of the premium.

III. Property held in trust, or on commission, must be insured as such; otherwise the policy will not cover such property; and in case

of loss the names of the respective owners shall be set forth in the preliminary proofs of such loss, together with their respective interests therein.

Goods on storage must be separately and specifically insured.

If the interest in property to be insured be a lease-hold interest, or other interest not absolute, it must be so represented to the company, and expressed in the policy in writing, otherwise the insurance shall be void.

NOTE.—By "property held in trust" is intended property held under a deed of trust or under the appointment of a court of law, or property held as collateral security; in which latter case this company shall be liable only to the extent of the interest of the assured in such property.

IV. Policies of insurance subscribed by this company shall not be assignable, either before or after loss, without the consent of the company expressed by endorsement made thereon. In case of assignment without such consent, whether of the whole policy
94 or of any interest in it, the liability of the company, in virtue of such policy, shall thenceforth cease, and the company reserves to itself the right to elect either to consent to the transfer, or return a ratable proportion of the premium and cancel the policy. And in case of any transfer or change of title in the property insured by this company, or of any undivided interest therein, such insurance shall be void and cease. In case of claim for loss or damage on a policy assigned where there is no actual sale or transfer of the property insured, proofs of loss shall be made by the assured in conformity with the conditions of this policy in like manner as if no assignment had been made; otherwise this policy shall be void, and of no force or effect whatever, and all liability on the part of this company shall cease.

V. Notice of all previous insurance upon property insured by this company shall be given to them and endorsed on this policy, or otherwise acknowledged by the company, in writing, at or before the time of their making insurance thereon; otherwise the policy subscribed by this company shall be of no effect. And in case of subsequent insurance on property insured by this company, notice must also, with all reasonable diligence, be given to them, to the end that such subsequent insurance may be endorsed on the policy subscribed by this company, or otherwise acknowledged in writing; in default whereof, such policy shall thenceforth cease, and be of no effect. And in all cases of insurance this company shall be liable only for such ratable proportion of the loss or damage happening to the subject insured as the amount insured by this company shall bear to the whole amount insured thereon, without reference to the dates of the different policies.

VI. In case of fire, or loss or damage thereby, or of exposure to loss or damage thereby, it shall be the duty of the insured to use their best endeavors for saving and preserving the property. And if they shall fail so to do, this company shall not be held answerable to make good the loss and damage sustained in consequence of such neglect. And it is mutually understood that there can be no abandonment to the insurers of the subject insured.

This company will not be liable for loss or damage caused by lightning, except that which results from fire that may ensue therefrom; nor for any loss, either by fire, or otherwise, occasioned by the explosion of a steam-boiler, or occasioned by camphene, or by the explosion of gunpowder, or any other explosive substance.

VII. Books of account, written securities or evidences of debt, title deeds, writings, and money or bullion, are not deemed objects of insurance.

95 VIII. Jewels, jewelry, precious stones, watches, plate, medals, musical instruments, printed music, scientific instruments, paintings, prints, engravings, statuary, sculptures, curiosities, casts and models, are not included in any insurance, unless particularly specified in the policy.

IX. Persons sustaining loss or damage by fire are forthwith to give notice thereof in writing to the company or its agent; and as soon after as possible they shall deliver as particular an account of their loss and damage as the nature of the case will admit, signed with their own hands. And they shall accompany the same with their oath or affirmation, declaring the said account to be true and just; showing also whether any and what other insurance has been made on the same property, giving a copy of the written portion of the policy of each company; what was the whole cash value of the subject insured; what was their interest therein; in what general manner (as to trade, manufactory, merchandise, or otherwise) the building insured or containing the subject insured, and the several parts thereof, were occupied at the time of the loss, and who were the occupants of such building; and when and how the fire originated, so far as they know or believe. They shall also produce a certificate under the hand and seal of a magistrate, notary public, or commissioner of deeds, (most contiguous to the place of the fire, and not concerned in the loss, as a creditor or otherwise, or related to the insured or sufferers.) stating that he has examined the circumstances attending the fire, loss or damage alleged, and that he is acquainted with the character and circumstances of the insured or claimant, and that he verily believes that he, she, or they have, by misfortune, and without fraud or evil practice, sustained loss and damage on the subject insured, to the amount which such magistrate, notary public, or commissioner of deeds shall certify.

When merchandise, or other personal property, is partially damaged, the insured shall forthwith cause it to be put in good order, assorting and arranging the various articles according to their kinds, separating the damaged from the undamaged goods, and shall cause a list or inventory of the whole to be made, naming the quantity and cost of each kind. The amount of damage shall then be ascertained by the examination and appraisal of each article by disinterested appraisers, mutually agreed upon, one-half of the appraisers' fee to be paid by the insurers; shall, if required, submit to an examination, under oath, by the agent or attorney of the company, and answer all questions touching his, her, or their knowledge of anything relating to such loss or damage, or to their claim thereupon, and subscribe such examination, the same being reduced to writing; and whenever

required in writing, the insured, or person claiming, shall produce and exhibit his books of account and other vouchers to the insurers or their agent, at the office of this company, in support of his claim, and permit extracts and copies thereof to be made; and shall also exhibit to any persons named by the company, and shall permit to be examined by them, any property damaged on which any loss is claimed, or any property saved, which was insured by this policy. And until such proofs, declarations and certificates are produced, and such appraisals and examination of property permitted by the claimant, the loss shall not be payable.

All fraud or false swearing, shall cause a forfeiture of all claims on the insurers, and shall be a full bar to all remedies against the insurers on this policy.

X. In case of any loss or damage to the property insured, it shall be optional with the company to replace the articles lost or damaged, with others of the same kind and quality, and to rebuild or to repair the building or buildings within a reasonable time; giving notice of their intention so to do within thirty days after having received the preliminary proofs of loss required by the ninth article of these conditions. In case differences shall arise concerning the amount of any loss or damage by fire, the matter shall, at the written request of either party, be submitted to the judgment of arbitrators indifferently chosen, whose award in writing, as to the amount of such loss and damage, shall be binding on the parties. Payment of losses shall be made in 90 days after the loss shall have been ascertained and proved.

XI. Insurance, once made, may be continued for such further time as may be agreed on, the premium required therefor being paid and endorsed on the policy, or a receipt given for the same, and all insurances, original or renewed, shall be considered as made under the original representation, in so far as it may not be varied by a new representation in writing, which in all cases it shall be incumbent on the party insured to make, where the risk has been changed, either within itself, or by the surrounding or adjacent buildings; and if, at or before the time of renewing any policy of insurance on property where the risk has been increased by the erection of buildings, or by the use or occupation of the premises insured or of the neighboring premises, the assured shall fail to give information thereof, said policy and renewal shall be void and of no effect.

XII. When a policy is made and issued upon a survey and description of certain property, such survey and description shall be taken and deemed to be a part and portion of such policy, and warranty on the part of the assured.

XIII. Where property insured by this company is damaged by removal from a building in which it is exposed to loss by fire, said charge shall be borne by the insured and the insurers, in such proportion as the whole sum insured bears to the whole value of the property insured, of which proof in due form shall be made by the claimant.

XIV. The company will not be answerable for any loss arising form the use of fires in buildings unprovided with a good and substan-

tial stone or brick chimney, or in consequence of neglect or deviation from the laws or regulations of police, made to prevent accidents from fire, in places where laws and regulations on this subject exist.

XV. It is furthermore hereby expressly provided that no suit or action of any kind against said company for the recovery of any claim upon, under, or by virtue of this policy, shall be sustainable in any court of law or chancery, unless such suit or action shall be commenced within the term of six months next after any loss or damage shall occur; and in case any such suit or action shall be commenced against said company after the expiration of six months next after such loss or damage shall have occurred, the lapse of time shall be taken and deemed as conclusive evidence against the validity of the claim thereby so attempted to be enforced.

96 THE STATE OF IOWA,
Dubuque City and Co., ss:

Pleas before the city court in and for the city and county and State aforesaid, at the June term thereof, A. D. 1860, before the Hon. Samuel M. Pollock, judge.

Be it remembered that on the 25th day of June, A. D. 1860, the following proceedings were had in said court on the following entitled cause, to wit:

WILLIAM LONGHURST
vs.
THE CITY FIRE INSURANCE COMPANY, of Hartford, Conn.
} Petition at law.

This cause coming up for hearing, upon defendant's motion for change of venue from this to the United States district court for the northern division of Iowa, which, after being fully heard, is granted upon defendant's filing bond, to be approved by the clerk of this court, and upon the payment of all costs made since the filing of this suit and the cause contained.

97 THE STATE OF IOWA,
Dubuque City and County, ss:

I, Benj. Rupert, clerk of the city court, in and for the said city, do hereby certify that the foregoing is a true, correct, and examined copy and transcript of the proceedings and order of the said city court in the foregoing entitled cause, as the same appears of record in my office.

[L. S.] Witness my hand and seal of said court, hereunto affixed, at office, in the city of Dubuque. this 20th day of July, 1860.

BENJAMIN RUPERT, *Clerk.*

The costs in this case are all paid by B. McShirns, except one continuance and transcript—$1 50 pr. by Dond.

98 STATE OF IOWA,
Dubuque County, ss:

Henry T. Utley, of said county, being duly sworn, deposes and says that he has compared the annexed copy of original notice with said original notices on file, and that the same is a true copy thereof, and of whole of original notice.

HENRY T. UTLEY.

Subscribed and sworn to by me this 15th day October, 1860.

W. W. MILLS,
Deputy Cl'k U. S. Dist. Court.

99 WILLIAM LONGHURST
vs.
THE CITY FIRE INSURANCE COMPANY OF HARTFORD, CT.

In the above entitled cause, it being shown to the court that, on application of defendant, the above cause has been duly removed from the city court of the city of Dubuque, State of Iowa, and that a copy of the original process in said cause on this day filed in this court, upon application of defendant's counsel, Wilson, Utley & Doud, and Samuels, Allison & Crane, made in open court, it is now ordered that said cause be docketed among the law causes of this court, and that plaintiff be required to give security for costs.

200 *Answer.*

WILLIAM LONGHURST
vs.
THE CITY FIRE INSURANCE COMPANY OF HARDFORD, COT.

The City Fire Insurance Company of Hartford, in the State of Connecticut, defendant in the above entitled action, appears therein by Wilson, Utley and Doud, its attorneys, and answering the petition of the said pl'ff, therein says, that the said defendant is not indebted to the said plaintiff in the sum of three thousand dollars, or any other sum.

And further answering the petition, the said defendant says, that to much thereof as alleges that on the 19 day of November, 1857, the said defendant made and executed a certain policy of insurance, duly *duly* signed and countersigned by the officers of defendant, whereby, in consideration of the sum of fifty-five dollars to them in hand paid by plaintiff, the said defendant insured plaintiff against loss or damage by fire to the amount of three thousand dollars on the five-story brick building known as the Lawrence block, occupied for stores below, the upper portion to remain unoccupied during the con-
201 tinuance of this policy—the said premises being situated on east side of Main street, between 9th and 10th streets, in Dubuque,

Iowa; it being the intention of the said policy to cover a mechanic's lien on said building, whereby the said defendant, for the consideration above named, agreed and promised to make good to plaintiff, his executors, administrators and assigns, all such loss or damage (not exceeding in amount the sum named) as might happen by fire to the property as above specified, from the 19th day of November, 1857, unto the full end and term of eleven months thence next ensuing, which term would expire on the 19th of October, 1858—is untrue, and therefore the said defendant denies each and every part thereof. And the said defendant further answering, said: Petition says that so much thereof as avers that at the date aforesaid, and during the continuance and life of the said policy, he was interested in the said premises, insured to a large amount, to wit, to the sum of $18,000, said interest consisting in and being in the nature of a mechanic's lien upon the premises insured, is wholly untrue, and therefore he denies
202 each and every part thereof.

And further answering said petition the said defendant says: That so much thereof as alleges that on the 22nd day of January, 1858, the said insured premises were destroyed and consumed by fire, whereby plaintiff suffered loss and damage to a large amount, to wit, to the sum of seventeen thousand dollars is untrue, except the single allegation that the Lawrence block was burned and consumed by fire on the 22nd day of January, 1858.

And, therefore, the said defendant denies each and every part of the same, except the loss by fire of the building as aforesaid.

And the said defendant further answering the petition says: That so much thereof as alleges that immediately upon the happening of the said fire pl'ff gave notice of such loss to defendant, and duly furnished to defendant proofs of the loss sustained by defendant in accordance with the requirements of such policy is untrue; and, therefore, the said defendant denies each and every part thereof.

And further answering, avers that the said plaintiff did not sustain any loss or damage whatever.

203 And further answering, denies that the said defendant became indebted to *to* the plaintiff in the sum of three thousand dollars or any other sum.

And further answering, denies that the said plaintiff completed and furnished to said defendant finally proofs of loss on or about the 10th day of August, 1859.

And further answering said petition the said defendant says: That so much thereof as alleges that he (the said plaintiff) has in good faith performed and carried out all and singular the said articles, stipulations, conditions, matters, and things which were on his part to be observed and performed according to the forms and conditions of said policy of insurance is untrue; therefore the said defendant denies each and every part thereof.

And the said defendant further answering said petition says: That so much thereof as alleges that the said policy of insurance is still his, (plaintiff's property,) and that the said sum of three thousand

dollars is due him thereon is untrue; and therefore the said defendant denies each and every part thereof.

And further answering said petition the said defendant
204 avers: That the said plaintiff did not, immediately upon the happening of the fire aforesaid, give notice of such loss to the defendant, and furnish proofs of the same, as required by the terms and conditions of the alleged policy of insurance.

And further answering the said defendant avers: That a long time since, and before the commencement of this suit, the said plaintiff did sell, assign, and transfer the said alleged policy of insurance to some person, to the said defendant unknown, and at the same time kept and retained the principal debt against E. C. Davis, which was the basis of the alleged mechanic's lien, and to indemnify which the alleged policy of insurance was made, and which said sale and assignment rendered said alleged policy invalid and void.

And further answering the said petition the said defendant avers: That on the 19th day of November, 1857, the said pl'ff did not have, own, hold, or possess a mechanic's lien on the Lawrence block aforesaid, situated in the said city of Dubuque, nor any other interest whatever in the said building.

And the said defendant further avers: That on the 22nd day of January, 1858, the day on which the said Lawrence block was *was* consumed by fire, the said plaintiff did not hold, own, or
205 possess a mechanic's lien in or on said building; that at the time last aforesaid a mechanic's lien in favor of the said plaintiff was not established on said building.

And the said defendant further avers: That at the time last aforesaid the said plaintiff did not have, own, or possess an insurable interest in the said Lawrence block.

And the said defendant further avers: That on the 19th day of November, 1857, the said plaintiff did not have, own, or possess an insurable interest in said building, nor at any time since the time last aforesaid.

And further answering the said petition the said defendant avers: That the said plaintiff has not kept or performed the conditions of the alleged policy of insurance set forth in the said petition; but, on the contrary, the said plaintiff has wholly failed, neglected, and omitted to perform the said conditions, and has wholly disregarded each of them.

And the said defendant further avers: That one of the conditions of the alleged policy of insurance provides that no suit or action of any kind against said company for the recovery of any claim upon, under, or by virtue of this policy shall be sustainable in any court of law or chancery, unless such suit or action shall be commenced
206 against said company within the term of six months next after any loss or damage shall occur, and in case any such suit or action shall be commenced against said company after the expiration of six months next after such loss or damage shall have occurred, the lapse of time shall be taken and deemed as conclusive evidence against the validity of the claim thereby so attempted to be enforced. And

the said defendant avers: That the suit or action on said alleged policy of insurance, and set forth in the said plaintiff's petition, was not commenced within six months next after the loss or damage by fire; but the same was commenced after two years had elapsed after such alleged loss or damage by fire, which said neglect, failure, and omission of the said plaintiff to commence his action as required by said conditions, and the lapse of time as aforesaid, renders the alleged policy of insurance invalid, null and void, and renders this action on said policy without consideration, and thereby barred and without authority of law.

And the said defendant further answering says: That the
207 alleged policy of insurance aforesaid provides and expressly stipulates that the building known as the Lawrence block, and alleged to have been insured by the said policy, was occupied for stores below at the time of making said alleged policy of insurance. And the said defendant further says: That the said alleged policy also provides and expressly stipulates that in case the said premises and Lawrence block shall at any time after the making of, and during the time the said policy would otherwise continue in force, become vacated either by the removal of the owner or occupant of said premises, unless immediate notice of the same shall be given said company and mentioned in or endorsed upon said policy, the alleged insurance shall be void and of no effect.

And the said defendant alleges that said agreement, condition, and stipulation in said policy of insurance was not kept, observed, or regarded by the said plaintiff; but, on the contrary, in and during the months of December and January, after making the alleged policy, the said Lawrence block and building aforesaid was not occupied for stores below, but the same were vacated, and remained vacated
208 from the time aforesaid till said building was destroyed by fire; and the said defendant avers that no notice of the same was given to said company and mentioned in or endorsed upon the the alleged policy, which said omission and neglect rendered the alleged policy null and void.

And the said defendant further says: That in the application and survey of said premises and building, which said application and survey is a part of the alleged policy of insurance, it is expressly agreed and provided that the first stories of said building are occupied for stores, which said stores the defendant avers were vacated in December, 1857, and remained vacated until said building was destroyed by fire, as aforesaid; and notice thereof was not given to the said defendant and endorsed on the alleged policy, which omission and neglect and breach of the condition of said policy rendered the same null and void.

And the said defendant further answering said petition says: That the said plaintiff, at the time of making said policy of
209 insurance, expressly stipulated and warranted that the said Lawrence block was occupied by stores below, and such stipulation and warranty was made a part of said policy, being inserted in the same. And the said defendant avers that the said Lawrence

block was not occupied by stores below at the time of making said policy, nor subsequently, which fact constitutes a misrepresentation and breach of warranty on the part of plaintiff that renders the said policy null and void.

And the said defendant further answering says: That in the alleged policy of insurance, and the application for and survey of premises for the same, which are a part of the alleged policy of insurance, there is a condition, stipulation, and warranty to the effect, in substance, that the first story of said Lawrence block and building was occupied for stores, and should continue to be occupied for stores during the term of the alleged policy, and the same and said part below should not be occupied for any other purpose or use; and the said defendant avers that during the month of December, 1857,
210 and *and* the month of January, 1858, the lower part of said Lawrence block and building was occupied and used for a dancing academy by one Thompson; and also, that said lower part and first story, in the months last aforesaid, were used for balls, dancing, entertainments, cooking for large gatherings of persons, and for victualling and entertaining said persons, whereby the conditions, stipulations, and warranty aforesaid were broken, violated, and unobserved, which renders the said alleged policy of insurance invalid, null, and void.

And further answering said petition the said defendant avers: The ninth condition of the alleged policy of insurance, set forth in the said petition, has not been observed, kept, or regarded by said plaintiff; that the said plaintiff did not deliver to the said defendant an account of the loss or damage as soon as possible after the said building was destroyed by fire. Nor did he, the said plaintiff, as soon as possible after the loss occurred, furnish the said defendant with an account of the plaintiff's alleged interest in said building;
211 nor did he furnish or produce a certificate of a magistrate or notary public as required by said condition.

And the said defendant further avers: That no part of the said ninth condition of said policy was in any manner kept, observed, or performed by the said plaintiff, but each and every part thereof was omitted, and the same was not regarded by the said plaintiff.

And the said defendant further answering said petition says: That the alleged mechanic's lien of the plaintiff, when the same was pretended to be established by judgment and order of the district court in Dubuque county, was invalid and of no value whatever, the same being no lawful, valid lien upon said building and premises, and the said pretended lien fixed no right or interest in the said plaintiff in said building and premises, for the reason that E. C. Davis, the alleged owner of said building and premises, was not in any manner the owner of said premises when the said alleged mechanic s lien was established, but the said premises, building, and the right and
212 title thereto had reverted absolutely to the owner thereof in fee, by paramount title and right, prior to the alleged mechanic's lien being established, and therefore the said defendant avers that the said alleged lien did not raise or create any right or interest in

the said building and premises in the said plaintiff. And the said alleged policy of insurance and claim are therefore invalid and without consideration.

And the said defendant further says, that the fifth condition of said alleged policy of insurance, was not kept and observed by the said plaintiff; but the same was violated and broken by him.

That at the time the alleged policy was made, executed and delivered, it was well known to the said plaintiff, and had for a long time prior thereto, been well known to him; that William G. David, the then owner of said building and premises, had previous insurance upon said Lawrence block and building, in the sum of about sixty thousand dollars, which was valid insurance and at that time subsisting,

to wit: The sum of five thousand dollars in the Hartford
213 Insurance Company of Connecticut; the sum of five thousand in the Phœnix Insurance Company, and the balance of said sum was effected in divers insurance companies to the defendant unknown; and at the time of effecting the insurance by the alleged policy in this action, the said plaintiff did not give to the defendant notice of such insurance aforesaid, and have the same endorsed on said alleged policy of insurance, nor in any other manner have the same acknowledged by said defendant in writing, whereby the said alleged policy of insurance is not now, nor has it ever been, of any legal effect, but the same is invalid, null and void.

And the said defendant, further answering said petition, says, that the interest in said property to be insured, and was insured, was a leasehold interest, and not absolute, and which said interest was not so represented to the said defendant, and expressed in the alleged policy, which said omission and misrepresentation rendered the alleged policy null and void.

214 And the said defendant, further answering said petition, says, that in the alleged policy, and also in the said application and survey, it was represented by the said plaintiff that he had a mechanics' lien on said Lawrence block; whereas, in truth, he did not have a mechanics' lien at that time, nor when said block was destroyed by fire, nor during the life of the alleged policy, which fact of not having a mechanics' lien constitute a misrepresentation that avoids and renders invalid the said alleged policy.

And the said defendant further says, that the said plaintiff, in said policy, did warrant that he had a mechanics' lien on the Lawrence block; whereas, he did not have such lien, which fact of not having a mechanics' lien constitute a breach of warranty that renders the alleged policy invalid.

Wherefore the said defendant asks judgment for costs of this action.

WILSON, UTLEY & DOUD,
Att'ys for Def't.

Filed Oct. 18th, 1860.

J. C. BURNS, *Clerk.*

215 In the U. S. dist. court. Oct. term, 1860.

STATE OF IOWA,
Northern Division, ss:

WILLIAM LONGHURST
vs.
THE CITY FIRE INSURANCE COMPANY OF HARTFORD. } Demurrer.

And now comes plaintiff and demurs to so much of defendant's answers as commences with the words, "And the said defendant," found near the middle of the tenth page of said answer, and ends with the words, "and without consideration," on the eleventh page, and for cause says:

First. That the matter set forth in said part of said answer do not constitute any defence to this suit.

Second. That the interest which E. C. Davis had in the premises when the lien was established by judgment, is an immaterial question, the rights of the parties being fixed when the fire occurred.

BISSEL, MILLS & SHIRUS,
Att'ys for Pl'ff.

Endorsed: William Longhurst *vs.* The City Fire Insurance Company of Hartford. Answer to demurrer. Filed Oct. 25th, 1860. J. C. Burns, clerk, by W. W. Mills, deputy. B. M. & S.

216 In the U. S. district court, northern division of Iowa. October term, 1860.

U. S. OF AMERICA,
State of Iowa:

WILLIAM LONGHURST
vs.
THE CITY FIRE INSURANCE COMPANY OF HARTFORD.

And now comes the said plaintiff and for reply to the answer of defendant, now on file, denies that before the commencement of this suit, or at any other time, the said plaintiff sold, assigned, or transferred, the said policy sued upon as alleged; and denies that thereby the said policy was rendered void; and denies that said plaintiff did not have a mechanic's lien on the said Lawrence block on the 19th day of Nov., 1857; and denies that plaintiff did not have a mechanic's lien on the 22d day of January, 1858, on the said Lawrence block; and denies that the same was not then established; and denies that plaintiff did not have an insurable interest on said premises on the said 19th day of November, 1857; and denies that plaintiff has not kept the conditions of insurance, annexed to said policy of insurance; and denies that he has in any manner broken the same.

And plaintiff, further replying to so much answer as sets
217 forth that condition of the policy requiring suit to be brought within six months from the happening of the fire, avers that such condition of said policy is null and void.

And further replying thereto, plaintiff says defendant ought not to allowed to plead the same in defence, for that plaintiff says that the said defendant has waived such condition, and has released pl'ff from the same.

And plaintiff further says, that the said defendant prevented this def't from bringing this suit within the said six months, and induced plaintiff to delay bringing this action within said limitation, by holding out inducements and propositions for an amicable settlement of the claim sued upon; and by its own acts contributed and induced the delay in bringing this action.

And plaintiff denies that such delay has in any manner invalidated or rendered void the said policy.

And plaintiff, further replying thereto, avers that in order to perfect and fully establish the proofs of loss as required in the said policy, it was necessary for the plaintiff to establish, by suits and judgment in court, his mechanic's lien and the amount thereof, on the said premises aforesaid. That plaintiff brought his action
218 for that purpose in the dist. court of Dubuque county, Iowa, at the term, 18 , of said court, and prosecuted the same as vigorously as possible to a final judgment; that the said action was contested, and owing to that fact plaintiff was not able to obtain judgment until the May term, 1859, of said court. That plaintiff used due diligence in the prosecution of such action, but could not sooner obtain a final decision therein; thereupon it became and was impossible for plaintiff to furnish the necessary proofs of loss, as required by such policy, until long after the expiration of the said limitation of six months as aforesaid; by reasons whereof plaintiff avers the said limitation is waived and plaintiff excused from fulfilling the same.

And plaintiff, further replying, denies that the said policy of insurance expressly stipulates that the said Lawrence block was occupied for stores below, and denies that said policy stipulated that, if said stores should become vacated, immediate notice thereof was to be given to defendant; and denies that such notice was not given; and denies that at any time the said Lawrence block was not occupied for stores below; and denies that said stores were vacated; and denies that any of the conditions or stipulations were broken or violated; and denies that the application and survey provided that the lower part of the said Lawrence block was to be used
219 and occupied as stores; and denies that there is therein a stipulation, condition, and warranty, that said block was occupied for stores, and that the same should not be used for any other purpose; and denies that during the month of December, 1857, and January, 1858, the lower part of said Lawrence block was occupied and used for a dancing academy by one Thompson; and denies that said lower part and first story of said Lawrence block were used

for balls, dancing, entertainments, cooking, &c., as alleged. And denies that the conditions of said policy were in any such manner violated and broken, as is therein set forth.

And denies that the ninth condition of said policy has been in any manner violated or broken, as is set forth in the said answer; and denies that plaintiff did not furnish their proofs of loss, as required by said policy; and denies that said proofs of loss were not furnished as soon as possible after the happening of said fire; and denies that said mechanic's lien is invalid and of no force; and denies that E. C. Davis was not the owner of said premises; and denies that said premises had reverted absolutely to the original lessors and owners as alleged; and denies that the fifth condition of said alleged policy was not kept; and denies that the same was violated in the manner alleged; and denies that William G. David had ob-
220 tained insurance to the amount of $60,000, or any other sum or any other insurance companies, as alleged; and denies that defendant was not notified thereof; and denies that the same was not endorsed on said policy; and denies that the interest to be insured was a leasehold interest; and denies that the same was not so represented to defendant; and denies that any misrepresentation was made use of in any manner; and denies that the plaintiff did not have a mechanic's lien upon said premises during the life of said policy; and denies all misrepresentation of every kind.

And plaintiff, further replying, denies each and every allegation in the said answer contained, and reaffirms the allegations in the petition contained, and prays judgment as therein asked for.

BISSELL, MILLS & SHIRUS,
Att'ys for Pl'ff.

Endorsed: William Longhurst *vs.* The City Fire Insurance Company of Hartford. Reply *de bene esse.* Filed Oct. 25th, 1860. J. C. Burns, cl'k, by W. W. Mills, deputy. B. M. & S.

221 WILLIAM LONGHURST
vs.
THE CITY FIRE INSURANCE COMPANY OF HARTFORD.

Rejoinder.

And the said defendant, for a rejoinder to the reply of the plaintiff in the above entitled action, says: That so much of the said reply as alleges that the said defendant ought not to be allowed to plead the condition of the alleged policy requiring suit to be brought within six months from the happening of loss by fire, for that the said defendant has waived such condition, and has released plaintiff from the same, is untrue; and therefore the said def't denies each and every part thereof.

And for further rejoinder to the reply of the said plaintiff, the said defendant says, that so much thereof as alleges that the said def't prevented this plaintiff from bringing this suit within the said six

months, and induced plaintiff to delay bringing this action within said limitation by holding out inducements and propositions for an amicable settlement of the claim sued upon, and by its own acts contributed to and induce the delay in bringing this action, is untrue; and therefore the said defendant denies each and every part
221 of the same.

And for further rejoinder to the reply of the said plaintiff, the said def't says that so much thereof as alleges that, in order to perfect and fully establish the proofs of loss, as required in said policy, it was necessary for plaintiff to establish, by suits and judgment in court, his mechanic's lien and the amount thereof on the said premises aforesaid; that plaintiff brought his action for that purpose in the district court of Dubuque co., Iowa, and prosecuted the same as vigorously as possible to a final judgment; that plaintiff was not able to obtain judgment until the May term, 1859, of said court, and was impossible for plaintiff to furnish the necessary proofs of loss, as required by such policy, until long after the expiration of said limitation of six months, as aforesaid, by means whereby the said limitation is waived, and plaintiff excused from fulfilling the same, is untrue, except the allegation that judgment and the mechanic's lien was not established till the May term, 1859, of the district court of Dubuque county; and therefore the said defendant denies each and every part of the same, excepting the allegation as aforesaid.

222 And for a further rejoinder to the reply of the said plaintiff, the said defendant denies that the condition of the policy requiring suit to be brought within six months after loss is null and void, and avers that said condition is valid, binding, and of full force.

Wherefore the said defendant asks judgment as prayed for in the answer in this action.

WILSON, UTLEY & DOUD,
Att'ys for defendant.

Endorsed: William Longhurst vs. The City Fire Insurance Company of Hartford. Rejoinder. Filed 26th, 1860. J. C. Burns, clerk.

Notice of motion.

223 United States Dist. court.—Northern division of Iowa.

WILLIAM LONGHURST
vs.
THE CITY FIRE INSURANCE COMPANY OF HARTFORD.

The said City Fire Insurance Company of Hartford, defendant in the above entitled action, now comes and moves the said court that so much of said plaintiff's reply in said action as alleges, "that defendant ought not to be allowed to plead in defence the conditions of the policy requiring suit to be brought within six months after the happening of the fire, for that said defendant has waived such conditions and has released plaintiff from the same," be stricken out of such pleadings because it is not a statement of new matter, in ordinary

language, constituting a defence. 2d. That it is a conclusion of law thus stated and not an account of facts. 3d. The same is indefinite.

WILSON, UTLEY & DOUD.

Endorsed: William Longhurst vs. the City Fire Insurance Company of Hartford. Notice of motion. Filed April 18th, 1861. J. C. Burns, clerk. W. U. & D.

224 In the United States district court for Iowa.

STATE OF IOWA,
Dubuque Co., ss:

WILLIAM LONGHURST
vs.
THE CITY FIRE INSURANCE COMPANY OF HARTFORD. } Amendment.

Now comes plaintiff, and for an amendment to his reply now filed in this court, in place of such reply striken out, on motion of defendant, the following:

And further replying thereto, plaintiff says, that said section of the conditions of insurance is no defence of this suit; for that the defendant, by holding out inducements of settlement, by urging and requesting plaintiff to *rove* up and perfect, in a court of law, his mechanic's lien against the property insured, by refusing to pay such loss, or to consider the loss sufficiently proven up unless such lien was evidenced by judgment of a court of law.

By the inducements and statements held out by defendant, that soon as such lien *lien* was fully established, the loss would be paid.

By stating to plaintiff that defendant desires to await the
225 action of the Phœnix Insurance Company in relation to this same loss, by stating that defendant would be governed by the result of the examination established by such Phœnix Insurance Company, and then refusing to abide by such action.

By conversations had and letters written, the said defendant waived a strict compliance with the terms of such condition in said policy, and released plaintiff therefrom.

BISSEL, MILLS & SHIRUS,
Att'ys for Pl'ff.

Endorsed: William Longhurst *vs.* The City Fire Insurance Company of Hartford. Amendment to reply. Filed April 29th, 1861. J. C. Burns, clerk.

B. M. S.

226 WILLIAM LONGHURST
vs.
THE CITY FIRE INSURANCE COMPANY OF HARTFORD. } Rejoinder.

The said defendant objects to the amendment to the reply of the

said plaintiff in the above entitled action, on the grounds that the same is vague, indefinite, and does not *and does not* state the person or persons with whom the alleged proceedings and transactions were had.

And for rejoinder to the said amendment to reply, the said defendant says, that so much thereof as alleges that defendant, by holding out inducements of settlement, by urging and requesting plaintiff to prove up and perfect, in a court of law, his mechanic's lien against the property insured.

By refusing to pay such loss, or to consider the loss sufficiently proven up, unless such lien was evidenced by judgment of a court of law.

By the inducements and statements held out by defendant, that as soon as such lien was fully established, the loss would be paid.

227 By stating that defendant would be governed by the result of the examination established by such Phœnix Company in relation to the cause of loss.

By stating to plaintiff that defendant desired to await the action of the Phœnix Company in relation to the cause of loss.

By conversations had and letters written, the said defendant waived a strict compliance with the terms of such condition in said policy, and released plaintiff therefrom, is untrue; and, therefore, the said defendant denies each and every part thereof.

WILSON, UTLEY & DOUD,
Att'ys for Plaintiff.

Endorsed: Wm. Longhurst *vs.* The City Fire Insurance Company of Hartford. Rejoinder to amendment to reply. Filed May 2d, 1861. J. C. Burns, clerk.

228 *Clerk's certificate.*

I, J. C. Burns, clerk of the district court of the United States for the district of Iowa, do hereby certify that the foregoing are true copies of the papers and minute entries necessary to constitute a record to the Supreme Court of the United States, as the same stand of file and of record in my office at Dubuque, Iowa, in the aforesaid case of William Longhurst, plaintiff, *versus* The City Fire Insurance Company of Hartford, Connecticut.

[SEAL.] Witness my hand and the seal of said court at Dubuque, Iowa, this 9th day of April, A. D. 1862.

J. C. BURNS, *Clerk.*

Filed Dec. 8, 1862.